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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

DWIGHT J. LOVING, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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QUESTIONS PRESENTED

This is the first capital conviction and death sentence affirmed by the military courts to come before this Court in the modern era of capital punishment. Due to its unique procedural status, this case raises several important constitutional questions regarding the manner in which the military capital punishment scheme was both constructed and currently operates. These questions are:

I. Is Congress' legislative responsibility to establish the aggravating circumstances to be used in military capital cases one which can be delegated to the President consistent with the separation of governmental powers required by Article I, §§ 1 and 8 and the Eighth Amendment of the United States Constitution?

II. Whether Congress has implicitly delegated to the President its legislative authority to establish aggravating circumstances to be used in military capital cases?

III. If there has been such an implicit delegation of authority to the President, has Congress established constitutionally adequate standards to guide the President's exercise of legislative authority?

IV. Do the Fifth and Eighth Amendments permit a capital defendant to be convicted of murder and sentenced to death by an eight person jury?

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DWIGHT J. LOVING, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Petititioner, Dwight J. Loving, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported as *United States v. Loving*, 41 M.J. 213 (1994), and is attached to this petition as Appendix A. The order denying rehearing is attached to this petition as Appendix B. *United States v. Loving*, No. 68033/AR (February 2, 1995) (pending publication).

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on November 10, 1994. Rehearing was denied by the United States Court of Appeals for the Armed Forces on February 2, 1995. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1259(1), the United States Court of Appeals for the Armed Forces (formerly the United States Court of Military Appeals) having reviewed this case pursuant to Uniform Code of Military Justice [hereinafter U.C.M.J.] article 67(a)(1), 10 U.S.C § 867(a)(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves:

1. U.S. Const. art. I, § 1, which provides, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

2. U.S. Const. art. I, § 8, which provides in pertinent part:

> The Congress of the United States shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces.

3. The Fifth Amendment to the United States Constitution, which provides, in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without due process of law."

4. The Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishments."

5. U.C.M.J. article 16(1)(A), 10 U.S.C. § 816(1)(A), which provides that a general court-martial may consist of "a military judge and not less than five members."

6. U.C.M.J. article 18, 10 U.S.C. § 818, which provides in pertinent part:

> [G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter. . . .

7. U.C.M.J. article 36(a), 10 U.S.C. § 836(a), which provides in pertinent part:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

8. U.C.M.J. article 56, 10 U.S.C. § 856, which provides that "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."

9. U.C.M.J. article 118, 10 U.S.C. § 918, which provides in pertinent part:

> Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—
>
> (1) has a premeditated design to kill;
>
> . . . . ; or
>
> (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;
>
> is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty

under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

10. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial [hereinafter R.C.M.] 1004(c), which, at the time of petitioner's trial, provided in pertinent part:

> *Aggravating factors.* Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:
>
> . . . .
>
> (7) That, only in the case of a violation of Article 118(1):
>
> . . . .
>
> (B) The murder was committed while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense;[1]
>
> . . . .
>
> (J) The accused has been found guilty in the same case of another violation of Article 118;
>
> (8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing.[2]

STATEMENT OF THE CASE

Dwight Loving enlisted in the United States Army in 1986 and was serving as a Private (E1) at Fort Hood, Texas, at the time of

[1] R.C.M. 1004(c)(7)(B) was amended in 1994.

[2] R.C.M. 1004(c)(8) was amended in 1991.

his offenses and trial. On January 31, February 9 and 21, March 6, 17, 23, 27-31, and April 1 and 3, 1989, Private Loving was tried at Fort Hood before a general court-martial composed of eight officer members.[3] He was found guilty of attempted murder, premeditated murder, felony murder, and four specifications of robbery, in violation of U.C.M.J. articles 80, 118(1) and (4), and 122, 10 U.S.C. §§ 880, 918(1) and (4), and 922, respectively. The court-martial panel announced three aggravating factors, pursuant to R.C.M. 1004(c)(7)(B) and (J) and R.C.M. 1004(c)(8), and sentenced petitioner to death, a dishonorable discharge, and forfeiture of all pay and allowances.

Petitioner's convictions and sentence were subsequently affirmed by the United States Army Court of Criminal Appeals (formerly the United States Army Court of Military Review). *United States v. Loving*, 34 M.J. 956 (A.C.M.R. 1992).[4] The Army court denied a petition for reconsideration on April 15, 1992. *United States v. Loving*, 34 M.J. 1065 (A.C.M.R. 1992).[5] The United States Court of Appeals for the Armed Forces affirmed the Army court's decision on November 10, 1994. *United States v. Loving*, 41 M.J. 213 (1994). The Court of Appeals denied a petition for reconsideration on February 2, 1995. *United States v. Loving*, No. 68033/AR (February 2, 1995) (pending publication).

HOW THE QUESTIONS PRESENTED WERE RAISED AND DECIDED BELOW

Following the decision of the United States Court of Appeals for the Armed Forces in *United States v. Matthews*, 16 M.J. 354

[3] Twelve members were detailed by the convening authority, but four were excused through challenges for cause and peremptory challenges.

[4] A copy of the Army court's decision is attached as Appendix C.

[5] A copy of the Army court's opinion denying reconsideration is attached as Appendix D.

(C.M.A. 1983),[6] the President amended the Manual for Courts-Martial, United States, 1969 (Rev. Ed.), to include capital sentencing procedures and establish specific aggravating factors. Executive Order 12460, 49 Fed. Reg. 3169 (1984). The President subsequently promulgated the Manual for Courts-Martial, United States, 1984, which became effective on August 1, 1984, and included the aggravating factors to be applied in capital cases in R.C.M. 1004(c).[7]

The constitutionality of R.C.M. 1004(c) was first reviewed by the United States Navy-Marine Corps Court of Criminal Appeals (formerly the United States Navy-Marine Corps Court of Military Review), in *United States v. Curtis*, 28 M.J. 1074 (N.M.C.M.R. 1989).[8] This judgment was later reviewed in a bifurcated appeal by the United States Court of Appeals for the Armed Forces.[9] *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991).[10] The Armed Forces Court of Appeals ruled in *Curtis* that Congress may delegate its authority to the President to establish capital sentencing procedures and aggravating factors.

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[6] In *Matthews*, the court recognized the infirmity in military capital sentencing procedures in light of this Court's opinion in *Furman v. Georgia*, 408 U.S. 238 (1972), and its progeny. Specifically, the court held that then existing standards were defective because there was no requirement "that the court members make specific findings as to individualized aggravating circumstances." *Matthews*, 16 M.J. at 380. The court declared, however, that the defects could be corrected either by Congress in the exercise of its Article I power, or by the President "in the exercise of his responsibilities as commander-in-chief under Article II, Section 2, and of powers expressly delegated to him by Congress." *Matthews*, 16 M.J. at 380.

[7] R.C.M. 1004 was subsequently amended in February 1986, July 1991 and November 1994.

[8] The Navy court's opinion is attached as Appendix E.

[9] The court bifurcated the proceedings to determine the constitutionality of R.C.M. 1004 and the military capital punishment process prior to addressing the merits of the case. *Curtis*, 32 M.J. at 255.

[10] The court's opinion is attached as Appendix F.

Id. at 260. Moreover, the court held that "Congress has—at least, implicitly—delegated" to the President the power to establish capital sentencing procedures and aggravating factors. *Id.* at 263 n.9.[11] The court, finally, found that the President's delegated authority had been sufficiently guided by the language of U.C.M.J. article 36(a). *Id.* at 263.[12]

Likewise, the Armed Forces Court of Appeals held in *Curtis* that there was no constitutional infirmity in allowing a sentence of death to be imposed by a court-martial composed of less than twelve members. First, the court declared that "courts-martial are not subject to the jury-trial requirements of the Sixth Amendment." 32 M.J. at 267. Next, the court dispensed with the Eighth Amendment by declaring simply that "state courts are not required constitutionally to have 12 members." *Id.*

Prior to trial, petitioner challenged the President's authority to establish R.C.M. 1004. Tr. Rec. at 200-06, Appellate Exhibit XLII. The military judge denied the motion. Tr. Rec. at 289. On appeal to the Army court, petitioner continued the challenge to the constitutionality of R.C.M. 1004 and also challenged the constitutionality of a court-martial panel composed of only eight members. The Army court did not discuss these issues at all. *United States v. Loving*, 34 M.J. 956 (A.C.M.R.), *recon. de-*

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[11] Because the court found an implicit delegation of authority to the President, it declined to "consider what inherent authority the President would have in this area." Thus, the question of inherent authority is not before this Court. *Id.*

[12] Despite the fact that the lower court ruled against Curtis on the constitutionality of the aggravating factors in R.C.M. 1004 issue and the twelve-member panel issue, the lower court remanded Curtis' case to the Navy-Marine court on another issue. *United States v. Curtis*, 33 M.J. 101 (C.M.A. 1991), *cert. denied*, 502 U.S. 1097 (1992). Thus, in response to Curtis' petition for a writ of certiorari on the questions presented in this petition, the sole government response was that the issue was not ripe for review because of the remand. This Court declined to grant a writ of certiorari in *Curtis* although Justices White and Blackmun dissented from denial of certiorari. *Curtis v. United States*, 502 U.S. 952 (1991).

nied, 34 M.J. 1065 (A.C.M.R. 1992).[13] The Armed Forces Court of Appeals also declined to discuss these issues citing its opinions in *Matthews* and *Curtis*. *United States v. Loving*, 41 M.J. 213, 287, 293 (1994).

REASONS THE WRIT SHOULD BE GRANTED

The substantial and important federal constitutional and statutory issues presented in petitioner's case are controlled by two normally separate and distinct bodies of constitutional law; the separation of powers doctrine and the heightened need for reliability demanded in capital cases pursuant to this Court's Eighth Amendment jurisprudence. Because this is the first death sentence affirmed by the military courts to come before this Court in the modern era of capital punishment, the intertwined separation of powers and Eighth Amendment issues make this a case of first impression warranting the invocation of this Court's certiorari jurisdiction.

I. PURSUANT TO THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE DOCTRINE OF SEPARATION OF POWERS, THE ESTABLISHMENT OF AGGRAVATING FACTORS TO BE USED IN CAPITAL CASES IN THE ARMED FORCES TO NARROW THE CATEGORY OF PERSONS ELIGIBLE FOR THE DEATH PENALTY IS A LEGISLATIVE DECISION VESTED EXCLUSIVELY IN CONGRESS AND CANNOT BE DELEGATED TO THE PRESIDENT.

A. The establishment of aggravating factors to be used in military capital cases is a legislative decision vested exclusively in Congress and may not be delegated.

In *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), a five-justice majority of this Court declared that the death penalty, as then applied, violated the Eighth and Fourteenth Amend-

[13] The court simply declared, "Several of the issues raised have been resolved by the Court of Military Appeals and will not be discussed in this opinion." 34 M.J. at 958 (citing *Curtis*).

ments. A common theme ran through all five concurring opinions: without reliable guidelines established by the state legislatures and Congress to be followed by judges and juries, the death penalty was being imposed in an unconstitutionally arbitary and capricious manner. The practical affect of this Court's decision was to invalidate all existing capital punishment provisions, including the death sentence provision of U.C.M.J. article 118.

As will be set forth below, post-*Furman* Eighth Amendment jurisprudence has established even more clearly that capital punishment schemes—including the determination of the classes of offenders eligible for the death penalty—must be established by a legislature. These determinations are substantive policy decisions and, therefore, a legislative function in the same manner that defining criminal offenses is a legislative function.[14] *See Whalen v. United States*, 445 U.S. 684, 689 (1980) ("the *legislative power*, including the power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly in *Congress*") (emphasis added).

This Court recognized long ago, in *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (citing *Weems v. United States*, 217 U.S. 349 (1910)), that the words of the Eighth Amendment "are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." In giving life to this standard, the Court has consistently and repeatedly emphasized the need for legislative action whenever a jurisdiction wished to restore the death penalty. In *Gregg v. Georgia*, 428 U.S. 153

[14] This injunction—with the sole exception of the Armed Forces—has been honored. Petitioner's counsel are not aware of *any other* jurisdiction with capital punishment as a sentencing option, including the federal system, where the determination of aggravating factors in a capital case was made outside the halls of the legislature. More specifically, in no state that allows the death penalty has the Governor established the aggravating factors.

(1976), this Court emphasized, even as it held that capital punishment was not a *per se* violation of the Eighth Amendment, that:

> the constitutional test is intertwined with an assessment of contemporary standards and the *legislative* judgment weighs heavily in ascertaining such standards. "[I]n a democratic society *legislatures, not courts,* are constituted to respond to the will and consequently the moral values of the people."

428 U.S. at 175-76 (Opinion of Stewart, Powell, and Stevens, JJ.) (emphasis added) (internal citation omitted). Construing the meaning of *Gregg,* the Court declared in *Zant v. Stephens,* 462 U.S. 862 (1983):

> In *Gregg,* the joint opinion again recognized the need for *legislative* criteria to limit the death penalty to certain crimes: "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."

Id. at 877 n.15 (quoting *Gregg,* 428 U.S. at 184) (emphasis added). Likewise, in *McCleskey v. Kemp,* 481 U.S. 279 (1987), this Court again declared that, "[i]t is the *legislatures, the elected representatives of the people,* that are 'constituted to respond to the will and consequently the moral values of the people.' " *Id.* at 319 (quoting *Furman,* 408 U.S. at 383 (Burger, C.J., dissenting)) (emphasis added).[15]

In light of this Eighth Amendment jurisprudence and the doctrine of separation of powers which demands that Congress be

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[15] *See also Harris v. Alabama,* __U.S. __, 115 S.Ct. 1031, 1035 (1995); *Penry v. Lynaugh,* 492 U.S. 302, 331 (1989); *Stanford v. Kentucky,* 492 U.S. 361, 370 (1989); *Thompson v. Oklahoma,* 487 U.S. 815, 821 (1988).

the designated voice to express the conscience of the community, it is apparent that the determination of when and under what circumstances the death penalty is appropriate is a substantive *legislative* determination.[16] Thus, the determination of aggravating factors to "genuinely narrow the class of persons eligible for the death penalty," *Zant v. Stephens,* 462 U.S. at 877, in the Armed Forces is uniquely the function of Congress. *See Gregg,* 428 U.S. at 176 (quoting *Gore v. United States,* 357 U.S. 386, 393 (1958)) (the specification of punishments is "peculiarly [a] question[ ] of legislative policy") Therefore, it is a responsibility Congress must discharge and it may not delegate its authority in this arena to anyone under any circumstances. *See J.W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 406 (1928) ("[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President").

B. If Congress may delegate its legislative authority to establish aggravating factors in military capital cases, it may not make that delegation to the President.

The common starting point under the separation of powers doctrine is that the Congress shall write the laws, the Executive shall implement the laws, and the Judiciary shall interpret the laws. Congress simply cannot delegate to the President the power to make laws. As this Court declared in *Field v. Clark,* 143 U.S. 649 (1892):

> The true distinction . . . is between the delegation of power to make the law, which necessarily involves a

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[16] The Armed Forces Court of Appeals in *Curtis* simply dismissed this question by declaring that aggravating factors are not elements of the offense. *Curtis,* 32 M.J. at 260. While this legal proposition is not disputed here, there can be no doubt that aggravating factors are *substantive elements* in the determination of whether death is an appropriate punishment. *Sawyer v. Whitley,* __ U.S. __, 112 S.Ct. 2514, 2522 (1992) (both the elements of the crime and the statutory aggravating circumstances are used to narrow the class of defendants eligible for the death penalty).

> discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

Id. at 693-94 (quoting *Cincinnati, W. & Z.R. Co. v. Commissioners of Clinton Co.*, 1 Ohio St. 77, 88-89 (1852)); *see also Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting). "[T]he intent of the Framers [was] that the powers of the three great branches of the National Government be largely separate from one another." *Buckley v. Valeo*, 424 U.S. 1, 120 (1976).

Although *Mistretta* does not control the outcome of this case,[17] the Court specifically recognized therein the dangers involved when Congress tries to confer upon the Executive the power to promulgate sentencing guidelines. Such an attempt "unconstitutionally . . . unite[s] the power to prosecute and the power to sentence within one Branch." 488 U.S. at 391 n.17.[18] The constitutional problem this Court anticipated in *Mistretta* is realized in petitioner's case.

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[17] In *Mistretta*, this Court determined that delegation of authority to promulgate *non-capital* sentencing guidelines to an independent Sentencing Commission within the *judicial* branch did not violate the non-delegation principle. *Mistretta* provides no authority to delegate Congressional power to the President in order to establish aggravating factors in capital cases, however, because this Court assumed "without deciding" that Congress could and had granted the Sentencing Commission authority in the capital case arena. 488 U.S. at 378 n.11.

[18] In fact, when Congress decided to place the Sentencing Commission in the Judicial Branch rather than the Executive Branch, this very concern was expressed:

> Giving such significant control over the determination of sentences to the same branch of government that is responsible for the prosecution of criminal cases is no more appropriate than granting such power to a consortium of defense attorneys.

H.R. Rep. No. 1017, 98th Cong. 2d Sess. 95 (1984).

Pursuant to his authority under Article II, § 2 of the United States Constitution, the President is Commander-in-Chief of the Armed Forces. As such he is ultimately responsible for the prosecution of all offenses committed by members of the Armed Forces. In addition, the President as Commander-in-Chief, supervises the convening authoritys, who in turn convene the court-martial tribunal and select the members to determine both guilt or innocence and sentence, if necessary. *See* Hearings on S. 857 and H.R. 4080, 81st Cong., 1st Sess. (1949), *reprinted in* Index and Legislative History of the Uniform Code of Military Justice, at 113-18 (statement by Committee on the Judiciary, United States Senate, on a Uniform Code of Military Justice).[19] Likewise, military judges at the trial and appellate levels are appointed as judges by The Judge Advocates General of the respective services, who are responsible to the President. *Weiss v. United States*, __ U.S. __, 114 S.Ct. 752 (1994); *see also Ryder v. United States*, 39 M.J. 454, 455 n.* (1994), *cert. granted*, __ U.S. __, 115 S.Ct. 713 (1995) (argued April 18, 1995). Furthermore, in addition to having the inherent constitutional power to pardon or commute criminal sentences, *Schick v. Reed*, 419 U.S. 256, 266 (1974), the President is specifically assigned, under U.C.M.J. article 71(a), 10 U.S.C. § 871(a), the task of reviewing and approving all sentences of death once direct review by the military courts is completed and the sentence is affirmed or certiorari is denied by this Court. In sum, permitting Congress to delegate its legislative authority to the

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[19] During these hearings, it was observed:

> Not belonging to the judicial branch of the Government, it follows the courts martial must pertain to the executive department; and they are in fact simply instrumentalities of the Executive power, provided by Congress for the President as Commander in Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein.

Id. at 115.

President places within the Executive the power to determine the class of military offenders eligible for the death sentence; the power to determine that petitioner should receive the death penalty; the power to convene the court-martial and select its members and the judge; and the final power to grant or withhold clemency once petitioner's direct appeal is completed.[20] This "blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." *Reid v. Covert*, 354 U.S. 1, 39 (1957).

II. CONGRESS HAS NOT EXPLICITLY OR IMPLICITLY DELEGATED TO THE PRESIDENT THE AUTHORITY TO ESTABLISH AGGRAVATING FACTORS TO DETERMINE THE CLASS OF MILITARY OFFENDERS ELIGIBLE FOR THE DEATH PENALTY.

A. In light of this Court's mandate that Congressional delegations of authority to limit individual rights must be construed narrowly, the provisions of the U.C.M.J. do not support a conclusion that Congress intended at the time the U.C.M.J. was enacted, to delegate authority to the President to establish aggravating factors.

This Court held in *Greene v. McElroy*, 360 U.S. 474, 506 (1959), that "acquiescence or implied ratification" is not "enough

[20] No other jurisdiction has allowed the executive to establish aggravating factors in capital cases. Several courts have held, however, that the *judiciary* may not establish aggravating factors in capital cases. *See, e.g., United States v. Woolard*, 981 F.2d 756, 759 (5th Cir.), *reh'g denied*, 990 F.2d 819 (5th Cir. 1993); *United States v. Harper*, 729 F.2d 1216, 1225 (9th Cir. 1984). Moreover, the blending of prosecutorial and legislative functioning present in the military far exceeds the constitutional delegation to the Attorney General in *Touby v. United States*, 500 U.S. 160 (1991). In *Touby*, Congress delegated to the Attorney General the authority to temporarily schedule controlled substances. In this case, however, the lower court found a permenent delegation to the President to do far more than simply schedule controlled substances and then prosecute those cases.

to show delegation of authority to take actions within the area of questionable constitutionality." *See also Mistretta*, 488 U.S. at 373 n.7 ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."). *Furman* and its progeny leave no doubt that the death sentence provision of Article 118 is in an "area[ ] of doubtful constitutionality." *Greene*, 360 U.S. at 507. Thus, no implicit delegation of authority or ratification by acquiescence may be found for the aggravating factors in R.C.M. 1004(c). Only "explicit action by lawmakers," *Greene*, 360 U.S. at 507, would suffice to render R.C.M. 1004(c) a constitutionally proper exercise of Executive authority. There was no such legislative action.

The lower court's finding of an *implicit* delegation of authority to the President is based, in part, on the language of U.C.M.J. articles 18, 36, and 56, which were set forth previously. In construing these statutes so broadly, the lower court violated three venerable maxims of statutory construction. First, statutes in criminal prosecutions are to be strictly construed against the government and in favor of the individual. *Deal v. United States*, __ U.S. __, 113 S.Ct. 1993, 1998 (1993) (Stevens, Blackmun, and O'Connor, JJ., dissenting) ("Criminal statutes must be strictly construed"); *United States v. Mersky*, 361 U.S. 431, 440 (1960) ("In the context of criminal prosecution, we must apply the rule of strict construction.") Second, in capital cases, there is an even greater need and demand for strict construction due to the heightened need for reliability in such cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.). Finally, in cases in which life, liberty, or property, as used in the Fifth Amendment Due Process Clause, are involved, courts must "construe narrowly all delegated powers that curtail or dilute them." *Kent v. Dulles*, 357 U.S. 116,

129 (1958). *See also Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 645 (1980) ("In the absence of a clear mandate . . . it is unreasonable to assume that Congress intended to give . . . unprecedented power").

With these principles in mind, it is readily apparent that none of the statutory provisions relied on by the court below supports a finding that Congress implicitly delegated lawmaking authority to the President. Clearly, none of these provisions expressly grants the President the authority to establish aggravating factors in a capital case. Moreover, in determining the implications of these provisions, it is necessary to consider the history of Congress' actions in enacting these articles. All of these articles were part of the Uniform Code of Military Justice as passed in 1950—22 years before this Court's decision in *Furman*—and they have not been substantially amended since that time.[21] Considered in this light, Congress did not intend (and could not have intended), in 1950, to grant the President the authority to establish aggravating factors in military capital cases satisfying Eighth Amendment principles which did not emerge until more than twenty years later. Articles 18, 36, and 56, therefore, provide no support for the lower court's decision.

B. Congressional actions and inactions since the establishment of R.C.M. 1004(c) are insufficient to support a conclusion that Congress implicitly delegated its authority to the President to establish aggravating factors to be applied in military capital cases.

In addition to citing articles 18, 36, and 56 of the U.C.M.J., the lower court relied on Congressional silence after R.C.M.

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[21] There were minor amendments to Article 18 in 1968. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1343. Article 36 underwent minor changes in 1979 and 1990. DOD Authorization Act of 1980, Pub. L. No. 96-107, 93 Stat. 804; National Defense Authorization Act of 1991, Pub. L. No. 101-510, 104 Stat. 1485.

1004 was promulgated in order to find that Congress had implicitly approved the President's actions. In doing so, the lower court cited this Court's opinion in *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396 (1961), for the proposition that "failure of Congress to complain about the content of regulations can be construed to be ratification." *Curtis*, 32 M.J. at 263. The lower court's reliance on *Power Reactor* is misplaced, however, because in that case, just as in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and *Haig v. Agee*, 453 U.S. 280 (1981), Congress had granted *prior explicit* authority to act in specific circumstances to reach a specified "end" and this Court only found *implicit* authority for and ratification of the agency's established "means" to reach the end. In this case, in contrast, Congress has never provided *prior explicit* authority for the President to establish the aggravating factors that are constitutionally required to narrow the class of persons eligible for the death penalty. Furthermore, since *Power Reactor*, this Court has explicitly stated on numerous occasions that, "[a]s a general matter, we are 'reluctant to draw inferences from Congress' failure to act.' " *Brecht v. Abrahamson*, __ U.S. __, 113 S.Ct. 1710, 1719 (1993) (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988)).

Finally, in finding an implicit delegation of authority to the President, the lower court held that Congress' amendment of U.C.M.J. article 106a, 10 U.S.C. § 906a, to authorize death as a punishment for espionage amounted to a ratification of the aggravating factors promulgated by the President in R.C.M. 1004(c). In the 1985 amendments to Article 106a—made two years after the President set forth the aggravating factors listed in R.C.M. 1004(c)—Congress established three specific aggravating factors, but also added "[a]ny other factor that may be prescribed by the President by regulations under section 836 of this title (article 36)." Article 106a(c)(4). The lower court

found that the amendments to Article 106a constituted a ratification of R.C.M. 1004 for essentially three reasons. First, the capital punishment procedure outlined in Article 106a "conforms generally to the procedure the President previously had prescribed." *Curtis*, 32 M.J. at 262. Second, Congress "specifically authorized" the President to establish aggravating factors in addition to those stated in Article 106a. *Id.* Finally, the court relied on the House Conference Report, which stated in part:

> The conferees did, however, adopt a statutory formulation of capital sentencing standards for espionage cases and intend that those standards be implemented in a manner consistent with the provision of Rule for Courts-Martial 1004 of the Manual for Courts-Martial, 1984. The conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards that already exist for the other capital punishment articles.

H.R. Conf. Rep. No. 235, 99th Cong., 1st Sess. 8, *reprinted in* 1985 U.S.C.C.A.N. 571, 579.

Contrary to the lower court's conclusion, the express delegation of authority in Article 106a can easily be interpreted to express the congressional belief that, absent an express delegation, the President would be without authority to promulgate aggravating factors under Article 106a. *Cf. Kent v. Dulles*, 357 U.S. at 130. Moreover, the statement that the "conferees do not intend that . . . [the amendments to] Article 106a be construed as affecting the validity of the regulatory capital sentencing standards . . . for the other capital punishment articles," clearly indicates that there was no intent for Article 106a to be read as validating or invalidating R.C.M. 1004(c). In fact, the conferees clearly stated that Article 106a should not be read to affect other provisions. Thus, if R.C.M. 1004(c) was invalid prior to the amendments to Article 106a, it remains invalid.

Even assuming for the sake of argument that the express delegation in article 106a and the Conference Report represents ex post approval of the President's decision to establish the aggravating factors in R.C.M. 1004(c), this belated expression of approval cannot act as a retroactive delegation of authority. Legislative authority may be delegated—just like any other act of Congress—only in accordance with the procedures established in Article I of the Constitution, i.e., "bicameral passage followed by presentment to the President." *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 954-55 (1983).

III. ANY IMPLICIT DELEGATION OF AUTHORITY TO THE PRESIDENT TO ESTABLISH AGGRAVATING FACTORS IS INVALID BECAUSE CONGRESS HAS NOT SET FORTH SUFFICIENT STANDARDS TO GUIDE THE PRESIDENT IN HIS EXERCISE OF AUTHORITY.

A delegation of legislative authority to the President, or to any other agency, is valid only "[s]o long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.' " *Mistretta*, 488 U.S. at 372 (quoting *J.W. Hampton, Jr. & Co.*, 276 U.S. at 409); *see also American Power & Light, Co. v. Securities & Exchange Commission*, 329 U.S. 90, 142 (1946) (delegation is "constitutionally sufficient [only] if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.") Conversely, whenever Congress has provided some guidance in a "legislative act," this Court has refused to find an unconstitutional delegation of legislative authority. *Mistretta*, 488 U.S. at 373 (recognizing that, with the exception of two cases, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), this Court has never held that Congress has improperly delegated power).

In *Mistretta* this Court found that adequate standards had been laid down by Congress to guide the discretion of the Sentencing Commission. To name only a few, Congress by legislative act had set forth the goals and purposes of sentencing which should guide the Commission; it had specifically directed the Commission to establish guidelines to determine sentencing ranges and to set forth specific formulas for determining sentencing ranges including a baseline; it had directed the Commission, in formulating offense categories, to consider specific factors, and it prohibited consideration of other factors, 488 U.S. at 374-76; and it had itself "enumerated various aggravating and mitigating circumstances" to provide some guidance to the Commission. *Id.* at 377.

In contrast to the holding in *Mistretta*, this Court held in *Panama Refining* that the National Industrial Recovery Act had not authorized the President to prohibit transportation of excess petroleum in interstate and foreign commerce because the statute:

> establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress . . . thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.

293 U.S. at 415. Thus, the Court found that the attempted delegation of authority was unconstitutional because "[t]he Congress left the matter to the President without standard or rule . . . [which] permits such a breadth of authorized action as essentially to commit to the President the functions of a Legislature rather than those of an executive or administrative officer executing a declared legislative policy." *See also A.L.A. Schechter*

Poultry, 295 U.S. at 541-42 (authority conferred by legislative act which "supplies no standards" is "an unconstitutional delegation of legislative power").

Attempting (unsuccessfully) to solve the problem created by Congress' failure to establish sufficient guidelines for the President to follow in establishing aggravating factors, the lower court looked to the language of U.C.M.J. article 36, which "directs that the President 'shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with' the Uniform Code." *Curtis*, 32 M.J. at 263. Even assuming *arguendo* that Congress has implicitly delegated to the President its authority to establish aggravating factors in military capital cases, the langauge of Article 36 gives insufficient guidance to the President.

In reviewing this issue, it is important to consider what "principles of law" were recognized in capital trials in the district courts at the time the President adopted R.C.M. 1004 in 1984. After this Court's opinion in *Furman* in 1972, the first Congressional enactment relating to the death penalty came in 1974 when Congress authorized the death penalty for aircraft piracy "if the death of another person results from the commission or attempted commission of the offense." 49 U.S.C. § 1472(i) & (n).[22] In addition, Congress specifically set forth a list of aggravating factors, at least one of which had to be found before a death sentence could be imposed. 49 U.S.C. § 1473(c)(7).[23] Congress did not enact any other death penalty legislation until after the President established the aggravating factors applied to

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[22] 49 U.S.C. § 1472 was recodified as 49 U.S.C. § 46502 in July 1994.

[23] 49 U.S.C. § 1473 was recodified as 49 U.S.C. § 46503 in July 1994 and repealed in September 1994. The aggravating circumstances that now apply to aircraft piracy are found in 18 U.S.C. § 3592, which was enacted in September 1994.

petitioner. Thus, the 1974 aircraft piracy legislation is significant because it was the only available "principle of law" to be applied in capital sentencing hearings in the United States District Courts, potentially relevant to Article 36(a), in existence when R.C.M. 1004 was promulgated in 1984.[24]

Given this fact, the lower court's finding that the aggravating factors established by the President "reflect policy expressed by Congress in various statutes—including several punitive articles of the Uniform Code of Military Justice—and also conform generally with the Model Penal Code and with policies expressed in the statutes of many of the 36 states which authorize the death penalty," *Curtis*, 32 M.J. at 263, is irrelevant. In the first instance, the "various statutes" enacted by Congress upon which the lower court relied to find (or create) congressional policy in support of R.C.M. 1004 do not (with the exception of Article 106a and 49 U.S.C. § 1472) include aggravating factors to be applied when death is an authorized punishment. Therefore, these non-capital statutes cannot possibly reflect congressional policy concerning aggravating factors to narrow the class of persons eligible for a sentence of death. Secondly, Article 106a and 49 U.S.C. § 1472 provided no guidance to the President. The aggravating factors in Article 106a could not have been considered by the President in 1984 because they were not enacted by Congress until 1985. Similarly, although 49 U.S.C. § 1472 existed in 1984, the aggravating factors established by

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[24] The 1974 congressional legislation is also significant for several other reasons. First and foremost, it clearly indicates Congress' recognition that, after *Furman*, aggravating factors were needed in order to comply with the requirements of the Eighth Amendment. Second, the 1974 legislation clearly shows that "[w]hen Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires." *Bell v. United States*, 349 U.S. 81, 83 (1955). Accordingly, if Congress had intended to reestablish the death penalty as a constitutionally acceptable punishment for offenses committed by those serving in the military, it would have done so in express terms.

the President in R.C.M. 1004(c) have almost no similarity to the aggravating factors set forth by Congress in 49 U.S.C. §§ 1472 and 1473.[25] Finally, the extent (if any) to which the aggravating factors of R.C.M. 1004(c) conform to the standards set forth in the Model Penal Code and state statutes is irrelevant to the issues of *congressional* intent and the rules established by Congress for application in the district courts. The question here is not whether the aggravating factors found in R.C.M. 1004(c) would be constitutional if established in an appropriate manner. Rather, the issue is whether the President had authority *ab initio* to establish those aggravating factors and whether Congress provided sufficient guidelines to exercise that authority, and the Model Penal Code and state statutes shed no light on this inquiry. *See generally Weiss*, 114 S.Ct. at 769 (Ginsburg, J., concurring) (quoting *Winters v. United States*, 89 S.Ct. 57, 59-60) (1968) (Douglas, J., opinion in chambers)) ("A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution").

IV. PETITIONER'S DEATH SENTENCE VIOLATES THE FIFTH AND EIGHTH AMENDMENTS BECAUSE OF THE DIMINISHED RELIABILITY INHERENT IN ALLOWING A SENTENCE OF DEATH TO BE RENDERED BY A COURT-MARTIAL PANEL COMPOSED OF FEWER THAN TWELVE MEMBERS.

Pursuant to U.C.M.J. article 16(1)(A) and 18, a general court-martial may consist of as few as five members and has "jurisdiction to try persons . . . for any offense made punishable by this chapter and may . . . adjudge any punishment . . . including the penalty of death when specifically authorized by this chapter." Based on the authority of these provisions, petitioner was

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[25] The sole exception is that the aggravating circumstance that the defendant created a risk of death to more than one person is found in both § 1473 and R.C.M. 1004.

sentenced to die by a court-martial composed of only eight members. Because a death sentence imposed by a jury or a court-martial panel composed of fewer than twelve members violates the Fifth and Eighth Amendments, certiorari should be granted in petitioner's case.

Three relevant constitutional principles delimit this issue. First, as noted in preceding sections of this petition, the Eighth Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. at 305. Second, because the Eighth Amendment requires the consideration of the "evolving standards of decency," *see Trop v. Dulles*, 356 U.S. at 100, this Court has consistently acknowledged and executed its obligatory task of "examin[ing] capital sentencing procedures against evolving standards of procedural fairness in a civilized society." *Gardner v. Florida*, 430 U.S. 349, 357 (1977). Finally, the Fifth Amendment procedural due process analysis, much like the Eighth Amendment "evolving standards" inquiry, takes into consideration whether a criminal process "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Herrera v. Collins*, __ U.S. __, 113 S.Ct. 853, 864 (1993) (quoting *Medina v. California*, __ U.S. __, 112 S.Ct. 2572, 2577 (1992) and *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

This Court recognized long ago that the demand for twelve-person juries in capital cases is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser v. Randall*, 357 U.S. 513, 523 (1958) (citation omitted); *see also Williams v. Florida*, 399 U.S. 78, 103 (1970) ("no state provides for less than 12 jurors [in capital cases]—a fact that suggests implicit recognition of the value of the larger body as a means of legitimizing society's decisions to impose the death penalty"). Moreover, considered in terms of the Eighth

Amendment concern with contemporary society and the standards that have evolved, it is apparent—as it was more than three decades ago when this Court decided *Speiser*—that the conscience of American society, as evidenced by its elected representatives in the legislatures, demands a twelve-person jury prior to imposition of a sentence of death. No state in this country that authorizes capital punishment permits imposition of death as a punishment by a jury composed of less than twelve jurors. *See* Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1, 63 n.298 (1980). This is true even in states that provide for smaller juries in non-capital criminal cases, and even in states where the jury plays only an "advisory" role in the capital sentencing process.[26] *See, e.g.*, Fla. Stat. § 913.10 (1985) ("Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other cases.") Moreover, twelve person juries are required in all capital cases in the United States District Courts. *See, e.g.*, 18 U.S.C. § 3593(b) and 21 U.S.C. § 848(i)(2). Thus, only in the military justice system could petitioner—or any other capital defendant—receive a death sentence from a panel or jury composed of less than twelve members.

In addition to being contrary to the conscience of society, petitioner's death sentence violates the Eighth Amendment because of the inherently diminished reliability of the determination by a panel composed of only eight members that death is the

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[26] Military judges, unlike judges in states where the jury is merely advisory, do not have authority to override the sentencing determination of the panel members. The jury's verdict, therefore, is absolutely binding on the court. While a capital defendant has no constitutional right to jury sentencing, *see, e.g., Harris v. Alabama*, 115 S.Ct. at 1037, *Spaziano v. Florida*, 468 U.S. 447, 463 (1984), when a jury is provided, the sentencing procedures used must comply with the "strictures dictated" by due process demands. *Morgan v. Illinois*, 504 U.S. 719, __, 112 S.Ct. 2222, 2229 (1992).

appropriate punishment.[27] In *Ballew v. Georgia*, 435 U.S. 223, 235 (1978), this Court opined that six member juries were *significantly* more likely to reach incorrect results than juries composed of twelve members. *Ballew* also recognized the inherent unfairness of smaller juror groups. *Id.* at 232-33. When considered in light of *Ballew*, a capital sentencing jury composed of less than twelve members is thus more susceptible to the influence of arbitrary and irrelevant factors that this Court has sought to exclude from the capital sentencing process. *See, e.g., Turner v. Murray*, 476 U.S. 28, 35 (1986) ("The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence").[28]

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[27] In addition, the reduction of the number of members also diminishes the likelihood that minority members will be selected, which is, of course, important from the perspective of the citizens selected as members, *see generally Powers v. Ohio*, 499 U.S. 400 (1991), and the perspective of a defendant who is a member of a minority race, such as petitioner. *See generally Batson v. Kentucky*, 476 U.S. 79 (1986).

[28] Moreover, Judge Wiss, in his dissent below, pointed out that the concern that arbitrary and impermissible factors may enter the sentencing deliberations room is very real in this case.

> On three of the issues, . . . I part company with the majority in two areas that relate to the bedrock for ensuring the fairness of a trial like this—a trial that ultimately may serve as the basis for executing this appellant: selection of and deliberations by court members. The first . . . raises the cancerous possibility that command influence inside the members' deliberation room during their consideration of a sentence so skewed the legally required voting procedures that it undermined the fundamental fairness of those proceedings; two other issues raise the specter of the insidious possibility of racial . . . and gender . . . discrimination infecting the convening authority's selection of the court-members who ultimately tried appellant. . . . As to each of these issues, therefore, I am compelled to dissent from the majority opinion.

Loving, 41 M.J. at 310 (Wiss, J., dissenting).

The susceptibility to arbitrary influence is especially heightened for military capital sentencing jurys because of the inherent peril of command influence. *See* U.C.M.J. article 37, 10 U.S.C. § 837 (unlawful influence of the action of a court is prohibited). Command influence is a term of art in the military, but generally implies a commander's improper influence based on rank and position of authority (either intentionally or unintentionally) on the decisions of court-martial members. It is an innate problem because all panel members are selected—and supervised in their military careers—by the general court-martial convening authority, *see* U.C.M.J. article 25(d)(2), 10 U.S.C. § 825(d)(2), who is typically the base commander and a general officer.[29] In addition to selecting the panel members, the convening authority is also the person who makes the prosecutorial determination that an accused shall be tried by a general court-martial for a capital offense, *see* U.C.M.J. article 22, 10 U.C.M.J. § 822, and who must approve any resulting death sentence, *see* U.C.M.J. article 60, 10 U.S.C. § 860. Thus, a capital defendant in the military goes on trial for his life before jurors who are hand-picked by the base commander, who are aware that the base commander has already determined that the offenses are atrocious enough that the government should seek the death penalty, and who must answer to the base commander in their career development. *See* Hearings on S. 857 and H.R. 4080, 81st Cong., 1st Sess. (1949) *reprinted in* Index and Legislative History of the Uniform Code of Military Justice, at 78-85 (1950) (Testimony of George Speigelberg for the Special Committee on Military Justice, American Bar Association).[30] Because of this

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[29] The convening authority in petitioner's case was a Major General (two stars).

[30] Mr. Speigelberg observed:

> Today, the average convening power of a general court martial . . . is a divisional commander. As a matter of fact, . . . the commanding general appoints or controls the appointment of

intrinsic obstacle to obtaining a fair and impartial jury in capital trials in the military, heightened scrutiny of the deliberations of the court-martial panel is necessary.[31] While requiring a court-martial panel composed of a minimum of twelve members in capital cases will not eradicate command influence concerns, it will greatly diminish the risk of arbitrary and capricious imposition of death as a punishment.

> the trial judge advocate who is the prosecutor, . . . and of the court which tries the man accused of crime.
>
> That court is chosen exclusively from members of the commanding officer's command. They look, properly and necessarily, to the commanding officer for promotion, for assignment, for efficiency ratings, and for quarters. Indeed, it is no exaggeration to say that their future in the Army is entirely dependent of their commanding officer's good will.
>
> Now, if it please the committee, that situation, so long as it is allowed to exist, carries in it the germ of injustice.

Id. at 76-77.

[31] As noted, Judge Wiss did detect command influence in this case, albeit by the President of the panel as opposed to the convening authority.

CONCLUSION

For the foregoing reasons, this Court should grant review of the judgment of the United States Court of Appeals for the Armed Forces.

Respectfully submitted,

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June 2, 1995.

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 68,033.
CMR No. 8901123.

UNITED STATES, APPELLEE

v.

DWIGHT J. LOVING, PRIVATE U.S. ARMY, APPELLANT.

Argued Sept. 30, 1993.
Decided Nov. 10, 1994.

Accused was convicted by general court-martial, Stephen V. Saymisch, J., of premeditated murder, felony murder, attempted murder, and robbery. Accused was sentenced to death. The United States Army Court of Military Review, 34 M.J. 956, affirmed. On reconsideration, the United States Army Court of Military Review, DeGiulio, Senior Judge, 34 M.J. 1065, denied petition for reconsideration. Review was granted. The United States Court of Military Appeals, Gierke, J., held that: (1) court members' posttrial affidavits were not competent evidence as to any improper voting procedures during sentencing deliberations; (2) there was no unlawful command influence; (3) accused's confessions were not improperly coerced or involuntary; (4) evidence was lawfully seized from accused's girlfriend's apartment; (5) accused was not prejudiced by military judge's characterization of accused's duty performance as an aggravating circumstances; (6) military judge did not abandon his role as a neu-

tral officer; (7) accused was not denied a fair trial; and (8) death sentence did not violate the Constitution.

Affirmed.

SULLIVAN, C.J., filed an opinion concurring in part and in the result.

WISS, J., filed a dissenting opinion.

For Appellant: *Captain Teresa L. Norris* (argued); *Lieutenant Colonel James H. Weise, Major Fran W. Walterhouse, Captain David L. Thomas* (on brief); *Captain Roy H. Hewitt.*

For Appellee: *Major Joseph C. Swetnam* (argued); *Colonel Dayton M. Cramer* and *Lieutenant Colonel Joseph A. Russelburg* (on brief); *Major James L. Pohl* and *Captain John G. Giovannelli.*

Amicus Curiae on behalf of Appellant; John H. Blume (on brief); George H. Kendall—For NAACP Legal Defense Fund.

ON MANDATORY REVIEW

Opinion of the Court

GIERKE, Judge:

1. A general court-martial composed of officers convicted appellant, contrary to his pleas, of premeditated murder, felony murder, attempted murder, and robbery (specifications, in violation or Articles 118, 80, and 122, Uniform Code of Military Justice, 10 USC §§ 918, 880, and 922, respectively. The court-martial sentenced appellant to a dishonorable discharge, total forfeitures, and to be put to death.

The Court of Military Review* affirmed the findings and sentence twice. 34 MJ 956 (1992), *on recon.*, 34 MJ 1065 (1992), The record is before us for mandatory review pursuant to Article 67(a)(1), UCMJ, 10 USC § 867(a)(1) (1989). Appellant has assigned 70 errors, each of which is discussed seriatim. Having found no prejudicial error, we affirm the findings of guilty and the sentence of death.

Factual Background

On the evening of December 11, 1988, appellant robbed at gunpoint a 7-Eleven convenience store in Kileen, Texas, and obtained approximately $38.00. About an hour later, he robbed a second 7-Eleven store in Kileen, also at gunpoint, and obtained approximately $52.00.

Disappointed with the small amounts of money he had obtained from the 7-Eleven stores, he decided to rob taxicab drivers. At about 8:00 p.m. on the night of December 12, appellant called a cab to take him from the Handy Grocery Store in Kileen to Fort Hood. The cab driver was an active-duty soldier, Private

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* This court became a Court of Criminal Appeals effective October 5, 1994. Pub.L. No. 103-337, § 924(b), 108 Stat. 2663. The name of the court at the time of its decision in this case will be used herein.

(PVT) E-2 Christopher L. Fay, working for extra money. Appellant directed Fay to a secluded area on Fort Hood and, at gunpoint, demanded all his money. After receiving an unknown amount of money from Fay, appellant shot him in the back of the head. While watching the blood "gushing out" of the back of Fay's head, appellant shot him in the back of the head a second time. Fay died as a result of the gunshots. His body was discovered by another soldier at Fort Hood about 30 minutes later.

Appellant fled from the cab to his barracks room, counted the money, and called for a second cab about 8:15 p.m. The driver of the second cab was Bobby Sharbino, a retired Army sergeant. Appellant directed Sharbino to a secluded street in Killeen and, at gunpoint, took his money pouch, wallet, and a green BIC cigarette lighter. He ordered Sharbino to lie down on the seat and shot him in the head, killing him.

2. After killing Mr. Sharbino, appellant went to the home of his girlfriend, Ms. Nadia Pessina. They and a group of friends went to the Vegas Club, where Ms. Pessino was employed, to pick up her paycheck. They then went to another club, the Nubia Temple, where appellant became involved in an altercation with another male patron because the patron was staring at Ms. Pessina. During the altercation, appellant drew his pistol and invited the patron to go outside. As the patron advanced toward appellant, appellant backed up, stumbled over a chair, and dropped his pistol on the ground, causing it to discharge.

Appellant and Ms. Pessina hurriedly left the Nubia Temple. They went to a cab stand across the street from the Chapparal Club and took a cab, driven by Howard Douglas Harrison, to Ms. Pessina's residence, located at 909 Mimosa Street in Killeen. Mr. Harrison had difficulty pronouncing "Mimosa" and needed help to find the street. Appellant dropped off Ms. Pessina near her residence. After pulling a gun, he directed Harrison to a secluded street, demanded money, and took Harrison's wallet and coin changer, obtaining about $94.00. Appellant jerked Harrison's

head around and told him to open his mouth. Believing that he was about to be killed, Harrison grabbed the pistol. During the ensuing struggle, Harrison gained possession of the pistol after it went off. Then he attempted to shoot appellant, but the pistol would not fire. Harrison fled the scene, with appellant chasing him. After Harrison hit him, appellant ran to Ms. Pessina's house, having regained possession of the pistol.

Harrison returned to his cab and reported to his dispatcher that he had been robbed and that his assailant was going toward Mimosa street. Appellant spent the remainder of the night at Ms. Pessina's residence.

In the morning appellant took a cab back to his unit and accompanied his unit on field training. At about 3:00 p.m. he rode back from the field to the unit motor pool with his supervisor, Staff Sergeant (SSG) Barshaw. During the 35-40 minute ride from the field, appelant told SSG Barshaw that he had left his weapon and his field jacket behind. SSG Barshaw told him that he would retrieve them later and bring them to appellant.

At about the time that appellant was returning from the field with SSG Barshaw, a joint investigative team composed of members of the FBI, Army Criminal Investigation Command (CID), local police, and Texas Rangers were in Ms. Pessina's neighborhood. They had received a general description of appellant and Ms. Pessina from Mr. Harrison, the surviving cab driver. They talked to people at the Handy Grocery Store and in the neighborhood and were told, "Yeah, that's Nadia and she has a black boyfriend." They saw Ms. Pessina with her friend, Ms. Ira Printers. They asked her to state her name and she identified herself. They asked her where she lived, and she told them that she lived at 909 Mimosa Street. At that point "something clicked" which "connected" Ms. Pessina to Mr. Harrison's report. They asked her to come with them to the Killeen police station and she agreed.

3. The Killeen police did not consider Ms. Pessina a suspect at the time. She gave a statement to the police in which she

described her activities, including the cab ride to her residence, but she did not implicate appellant in any crimes. She stated that, after the cab driver dropped her off at her residence, appellant left in the cab to buy her some cigarettes, returned about 5 minutes later, and then spent the night with her.

At the end of the interview, at about 6:45 p.m., she signed a written consent to a search of her residence. At trial, Ms. Pessina, whose command of the English language is limited, testified regarding her consent as follows:

> I don't know if they have to have a warrant, or if they no need to have a warrant; I no know that. . . . But then—but, when I—no, when I was to the police station, they told me . . . that, if I want, I can get a warrant, to my house. And, they say: But, they gonna look, anyway, so . . . I let them look.

At about the time that the interview of Ms. Pessina was ending, appellant was apprehended in the unit motor pool by CID Special Agent (SA) Schnayerson. He was transported to the CID office, advised of his rights, and at about 7:30 p.m. waived his rights and agreed to make a statement. He denied any involvement for about 30 minutes. After SA Schnayerson asked appellant who would take care of the families of the murdered cab drivers, appellant confessed. Appellant's confession was videotaped.

In his confession appellant told SA Schnayerson that the pistol used in the crimes was hidden in a paper bag behind Ms. Pessina's residence. He also mentioned that he had worn black gloves during the offenses and that he took a ski mask to the 7-Eleven stores but decided not to wear it. He told SA Schnayerson that he only took cash from PVT Fay. He took money, a wallet, and a green BIC cigarette lighter from Mr. Sharbino. He threw the wallet into a dumpster next to his barracks but left the green BIC lighter at Ms. Pessina's residence. He told SA Schnayerson that he kept Mr. Harrison's wallet and its contents.

At about 9:00 p.m., while appellant was still being interviewed, SSG Barshaw returned to the unit's field location and retrieved appellant's field jacket and weapon. He found a coin changer after it fell out of a pocket of the field jacket. Suspecting some significance since he had been present when appellant had been apprehended in the motor pool, SSG Barshaw gave the field jacket and coin changer to his first sergeant and a CID agent. At trial, Mr. Harrison identified the coin changer as the one taken from him by appellant.

The taped interview of appellant ended at about 10:00 p.m., at which time appellant went to sleep on a soft in the CID office. From 10:00 p.m. until 6:00 a.m., the CID prepared a written transcript of the videotaped confession.

4. Meanwhile, a search outside Ms. Pessina's residence had yielded appellant's pistol, which was later identified as the weapon used in the murders and robberies; several spent and unspent bullets; and a blood-stained man's jacket. At 11:50 p.m., Ms. Pessina returned to the Killeen police station, was advised of her rights as a suspect, and gave a second statement. She admitted driving appellant to the vicinity of the two 7-Eleven stores on December 11. She admitted seeing appellant with a pistol at an unknown time prior to the murders and robberies. She said that appellant had told her on December 12 that "he was going to go and get some money" and "he was going to go kill somebody." Ms. Pessina said that she did not believe that appellant was serious. When appellant left the house in the early evening of December 12, Ms. Pessina "felt a bulge in his waistband" that she thought was a pistol. When appellant returned, he said, "I got the money. . . . I shot him."

After completing her second statement, she signed a written consent form for a second search of her residence, which occurred at about 2:15 a.m. on the morning of December 14. The second search resulted in seizure of a black ski mask, a pair of gloves, and a green BIC cigarette lighter.

Appellant was awakened in the CID office at about 6:00 a.m. on December 14. From about 6:15 to 7:15 a.m. he reviewed the 14-page transcript of his confession. He then signed it and swore to it. At 7:45 a.m. he was interviewed by Investigator John Wedge, a member of the Killeen police, and again confessed.

On December 16, Ms. Pessina gave a third statement to the police in which she said that appellant told her he had "shot two people" but she did not believe him. She also said that while in the cab on the way to 909 Mimosa, appellant "had the pistol I believe in the front of his pants or on the side and he pulled it out and keep it in his hand on the seat." She stated further, "I don't know what he was going to do, but I had a bad feeling about it."

5. The court-martial convicted appellant of the following Charges and specifications:

Charge I

Specification 1—Premeditated murder of Christopher L. Fay
Specification 2—Premeditated murder of Bobby Sharbino
Specification 3—Felony murder of Christopher L. Fay
Specification 4—Felony murder of Bobby Sharbino

Charge II

Specification—Attempted murder of Howard Douglas Harrison

Charge III

Specification 1—Robbery of Christopher L. Fay
Specification 2—Robbery of Bobby Sharbino
Specification 3—Robbery of Howard Douglas Harrison
Specification 4—Robbery of Genevieve Grant (7-Eleven cashier)
Specification 5—Robbery of Kimberly Gray and Guy Ensinger (7-Eleven cashiers)

The findings of guilty of the premeditated murder of Bobby Sharbino (specification 2 of Charge I), the felony murder of Christopher L. Fay (specification 3 of Charge I), and the felony murder of Bobby Sharbino (specification 4 of Charge I) were announced as unanimous. The fraction of the court voting for all other findings of guilty was not announced.

After the findings were announced, the military judge dismissed as multiplicious specification 1 of Charge I (premeditated murder of Fay), specification 4 of Charge I (felony murder of Sharbino), and specification 1 of Charge III (robbery of Fay). A sentencing hearing was conducted in accordance with RCM 1004, Manual for Courts-Martial, United States, 1984 (Charge 2), after which the court-martial, by unanimous vote, sentenced appellant to a dishonorable discharge, total forfeitures, and "to be put to death."

Additional relevant facts are set out below in connection with specific issues.

ISSUE I

WHETHER APPELLANT'S SENTENCE OF DEATH MUST BE SET ASIDE AND ONLY A LIFE SENTENCE AFFIRMED BECAUSE THE PANEL MEMBERS FOLLOWED IMPROPER VOTING PROCEDURES DURING THE SENTENCING DELIBERATIONS.

6. Based on *ex parte* affidavits obtained from 3 of the 8 court members almost 4 years after the court-martial, appellant now contends that the members did not vote at all on aggravating factors, did not follow the correct procedure for proposing sentences, did not vote first on the least severe sentence proposal, voted on proposals for life imprisonment and the death sentence at the same time, and reconsidered a less than unanimous vote to impose the death sentence without following the procedures for reconsideration.

A. Procedural Rules

In order to adjudge a death sentence, members must follow the voting procedures set forth in RCM 1004 (Change 2) and 1006. RCM 1004(b)(7) provides:

> In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with RCM 1006.

Under RCM 1006(c), "[a]ny member may propose a sentence." When the voting begins, RCM 1006(d)(3)(A) provides:

> All members shall vote on each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by the concurrence of the number of members required under subsection (d)(4) of this rule. The process of proposing sentences and voting on them may be repeated as necessary until a sentence is adopted.

RCM 1006(d)(4) provides that a death sentence must be adopted by unanimous vote and a sentence to life imprisonment requires a consensus of three-fourths of the members. *See Garrett v. Lowe*, 39 MJ 293 (CMA 1994).

B. The Instructions

7. During his sentencing instructions, the military judge informed the members that "a death sentence may not be adjudged unless all the court members find beyond a reasonable doubt

that one or more of the aggravating circumstances existed." He then described the three aggravating circumstances listed on the sentence worksheet and explained that "all the members of the court must agree beyond a reasonable doubt that one or more of the aggravating circumstances that I just mentioned existed at the time of the offenses or resulted from the offenses." He further explained:

> It is not sufficient that some members find that one aggravating circumstance existed while the remaining members find that a different aggravating circumstances existed. Rather, all of you must find beyond a reasonable doubt that the same aggravating circumstance or circumstances existed before a sentence of death may be adjudged.

After further instructions repeating the definition of reasonable doubt and describing the aggravating circumstances, he gave the following procedural instructions:

> You may consider all the evidence that has been presented to you in this case, including evidence presented prior to the findings of guilty in this case, as well as evidence, of course, presented after the findings during the sentencing phase of the trial. Your deliberation on the aggravating circumstances should properly include a full and free discussion of all the evidence that has been presented to you.
>
> After you have completed your discussion, then voting on each aggravating circumstance must be accomplished by secret written ballot. All of the members must vote, none of you are allowed to abstain. If you fail to find unanimously that at least one aggravating circumstance existed, then you may not adjudge a sentence of death. If, however, you determine that

> at least one of the aggravating circumstances existed, then you may consider, along with all other appropriate sentence possibilities, for example, punitive discharge and forfeitures in this case, whether a sentence of death should be adjudged. In this regard, you may not adjudge a sentence of death unless all of you find that any and all extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including such circumstances as you have found existed in the first step of the procedure. . . .

The military judge then listed six other "nonstatutory" aggravating circumstances as well as the extenuating and mitigating circumstances. The military judge concluded this portion of the instructions by again reminding the members that "[a] sentence of death may be adjudged only upon the unanimous vote of all the members."

8. Turning to the sentence worksheet, the military judge explained:

> Part A are those aggravating factors that I mentioned and at least one of them has to be found beyond a reasonable doubt, a unanimous finding on that particular aggravating circumstance before the rest of the procedures even apply in this case, and that would be the death sentencing procedures. All right. So that's step one.
>
> Step two, then, as you see on the worksheet, is this balancing of the aggravating and mitigating—extenuating and mitigating factors, it should be. It should read, Balancing of Aggravating and Extenuating and Mitigating Factors. There's a word left out. You might want to jot that in on the title under Part B. But in any case, that's step two, and what's reflected under Part B on the worksheet is step two of this process.

> Then, you move down to Part C, which is the actual sentence and that—that is step three, as I say, and I'll go into that in just a few moments with you in how to go about then determining an actual sentence in this case.

After instructing the members on forfeitures and punitive discharges, the military judge then gave the following procedural instructions for "step three," voting on sentences:

> When you close to deliberate and vote, only the members will be present during your closed session deliberations and your deliberations should begin, first, with a full and free discussion on the general subject of sentencing. The influence of superiority in rank shall not be employed in any manner in an attempt to control the independence or judgment of any other court member. When you have completed that discussion, then any member who desires to do so may propose a sentence and you do that by writing it down on a slip of paper, and that would be a complete or entire sentence. The idea behind that instruction is you shouldn't piecemeal the punishments. The junior member will collect those proposed sentences, submit them to the president, who will arrange them in the order of severity.
>
> You then vote on those proposed sentences by secret written ballot. All of you must vote, none of you are allowed to abstain. You vote on each proposed sentence in its entirety, beginning with the lightest, until you arrive at the required concurrence. For a sentence to death, all of you must concur in the sentence. For a sentence that includes life imprisonment, which is the mandatory minmum sentence, three-fourths of the members must agree on a sentence and that would be, because there are eight, six of you must agree.

The junior member will then collect and count the votes. The court is then checked by the president, who will immediately announce the result of the ballot to the rest of the court members. If you vote upon all of the proposed sentences without arriving at the required concurrence, then you repeat the process of proposing and voting on the sentences. The second time around, a member may desire—if a member desires to do so, you may vote on all new proposals or proposals rejected by an earlier vote. But remember, unanimous—a death sentence, unanimous vote, all the members, three-quarters for a sentence that includes life in prison.

Now, you may reconsider your sentence, no matter what it is, you may reconsider that sentence at any time before it is announced in open court by the colonel. If that occurs, then the proper procedure would be, just as I've indicated on findings, and that procedure would be: Number one, don't try to do it yourselves; number two, come back out, open the court, tell me, in very general terms, colonel, that a member, no specifics, please, a member has requested reconsideration. Then, at that time, I'll tell you what those instructions are. They are somewhat lengthy and involved, a little complicated, so I won't give them now, remember though that, legally, any member may request reconsideration. Please, though, remember the process.

C. The Announcement of the Sentence

9. The court members closed to determine a sentence at 1:14 p.m. Four hours and 41 minutes later, at 5:55 p.m., they informed the military judge that they had arrived at a sentence. The president of the court-martial then announced that they had unanimously found, "beyond a reasonable doubt," all three aggravating factors. Then he announced that the court-martial had found unanimously that "any extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including the factors as found indicated in Part A." Finally, the president announced the sentence: "To forfeit all pay and allowances, to be discharged from the service with a Dishonorable Discharge, to be put to death." A copy of the sentence worksheet is attached as an Appendix.

D. The Post-Trial Affidavits

10. The sentence was adjudged on April 3, 1989. In February 1993, appellate defense counsel obtained affidavits from Colonel Aylor, the court-martial president; and Major Napoli and Captain (CPT) Williams, members. Defense Appellate Exhibits (Def.App.Ex.) F, G, and H.

Colonel Aylor's affidavit states the following:

> The jury received instructions from the judge on sentencing and then we went into the jury room. I explained to the other members of the jury what we were supposed to do and how we would do it. I also reminded everyone that the minimum sentence was life imprisonment as explained to me by the judge. We did not re-vote and [sic] aggravating factors during the sentencing procedure. . . . The first vote resulted in the following: 7 votes of reduce to E1, forfeiture of all pay and allowances, bad conduct discharge and death; 1 vote of reduce to E1, forfeiture of all pay and allowances, bad conduct discharge and life imprisonment. The judge had explained before we adjourned that the death penalty required a unanimous vote. . . . After another 1½ hours of review, I asked if everyone was

prepared to vote again. They said they were. . . . The second vote resulted in the following: 8 votes of reduce to E1, forfeiture of all pay and allowances, bad-conduct [sic] discharge and death.

Major Napoli's affidavit states the following:

> Following Colonel Aylor's remarks, we voted by secret written ballot. Colonel Aylor counted the ballots.
>
> Since there was not a consensus, we discussed the facts and evidence in the case again. Afterwhich [sic] Colonel Aylor instructed us to vote again. This vote resulted in an unanimous sentence to death. . . .

Captain Williams' affidavit states the following:

> We discussed the facts and evidence in the case. Then Colonel Aylor told us that we each had two options, we could vote life imprisonment or death, but that death required a unanimous vote.
>
> Following Colonel Aylor's remarks, we voted by secret written ballot. Colonel Aylor counted the ballots and the result was seven in favor of death and one in favor of life imprisonment.
>
> Since there was no consensus, we discussed the facts and evidence in this case again. We did not seek help from the military judge. Instead, following our continued deliberations, Colonel Aylor instructed us to vote again. We voted using the same procedure as before, picking between death and life imprisonment. The result of the second vote was eight in favor of death and zero in favor of life. . . .

Based on the affidavits, appellant argues that the court-martial members did not follow the judge's procedural instructions.

More specifically, he argues that the members did not vote at all on the aggravating factors, did not follow the correct procedure for proposing sentences, did not vote first on the least severe proposed sentence, voted on the sentences to life imprisonment and death at the same time, and revoted after a 7-1 vote to impose the death sentence without following the procedures for reconsideration.

We conclude that the affidavits are ambiguous at best. For example, it is unclear what COL Aylor means when he speaks of a "revote" on aggravating factors. Likewise, it is unclear whether the 7-1 "vote" was actually the first round of proposed sentences or a permissible "straw poll." *See United States v. Lawson,* 16 MJ 38, 41 (CMA 1983).

11. Court members "are presumed to follow the military judge's instructions" *United States v. Holt,* 33 MJ 400, 408 (CMA 1991). In this case that presumption is reinforced by the sentence worksheet and the president's announcement that all members found that the aggravating factors were proven beyond a reasonable doubt, that all members found that the aggravating circumstances outweighed the extenuating and mitigating circumstances, and that all members voted to impose the death sentence. No court member disputed the president's announcement at the time.

We recognize that the presumption of compliance with the military judge's instructions can be rebutted by competent evidence to the contrary. The pivotal question with respect to Issue I is whether the affidavits are competent evidence. In this regard, Mil.R.Evid. 606(b), Manual, *supra,* provides:

> Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of the deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the mem-

> ber to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. . . .

Mil.R.Evid. 606(b) is taken from Fed.R.Evid. 606(b). Except for changes to reflect court-martial terminology, Mil.R.Evid. 606(b) is identical to Fed.R.Evid. 606(b) with one addition: the reference to unlawful command influence. *See* Drafters' Analysis of Mil.R.Evid. 606, Manual, *supra* at A22-41 (Change 2). The identical language is consistent with the statutory mandate in Article 36(a), UCMJ, 10 USC § 836(a), that the President prescribe procedures which, "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. . . ." By adopting the language of Fed.R.Evid. 606(b) in Mil.R.Evid. 606(b), the drafters clearly intended that the federal rule apply to courts-martial, with an additional provision for cases involving unlawful command influence.

12. The purpose of this rule is to protect "freedom of deliberation," protect "the stability and finality of verdicts," and protect court members "from annoyance and embarrassment." *United States v. Bishop*, 11 MJ 7, 9 (CMA 1981).

Appellant makes three arguments for considering the affidavits in this case. First, he argues that the rule is only intended to protect the subjective thoughts of the court members and does not preclude inquiry into objective factors such as voting procedures. Second, he argues that the affidavits indicate unlawful command influence on the part of the president, Colonel Aylor. Third, he argues that "death is different" and that Mil.R.Evid.

606(b) should not be strictly applied if there is evidence of a procedural irregularity in imposition of the death sentence. We find these arguments unpersuasive. Based on our reivew of judicial and legislative history, we hold that the affidavits are not competent evidence.

With regard to appellant's first argument, there is some authority among the precedents of this Court for the proposition that affidavits of court members may not be considered to support an allegation that the court members used erroneous procedures during deliberations. *See United States v. West*, 23 USCMA 77, 48 CMR 548 (1974) (opinion by Duncan, C.J., with Quinn, J., concurring in the result and Ferguson, S.J., not participating). Two Courts of Military Review have permitted asking court members whether voting was by secret written ballot, but both cases have justified such an inquiry on the ground that the possibility of oral voting raises the possibility of unlawful command influence. *See United States v. Greene*, 36 MJ 1068, 1071 (1993 ACMR9), *aff'd on other grounds*, 41 MJ 57 (CMA 1994); *United States v. Martinez*, 17 MJ 916, 918, 919-20 (NMCMR 1984). Most recently, in a capital murder case, the Navy-Marine Corps Court of Military Review has refused to consider post-trial evidence that court members did not follow the proper procedure for reconsidering their findings. *United States v. Thomas*, 39 MJ 626 (1993) (on motion).

The federal Courts of Appeals have uniformly refused to consider evidence from jurors indicating that the jury ignored or misunderstand instructions in criminal cases. *See United States v. Miller*, 806 F.2d 223, 225 (10th Cir.1986) (rejected general allegation by juror that she may not have understood judge's instructions); *United States v. Neary*, 552 F.2d 1184, 1190 (7th Cir.), *cert denied*, 434 U.S. 864, 98 S.Ct. 197, 54 L.Ed.2d 139 (1997) (rejected evidence that juror may not have understood burder of proof in criminal case); *United States v. Stacey*, 475

F.2d 1119, 1121 (9th Cir.1973) (rejected evidence that three jurors did not understand that "intent to defraud" was element of offense); *United States v. Dioguardi*, 492 F.2d 70 (2d Cir.) (rejected opinions of psychiatrists that juror was mentally incompetent and incapable of understanding instructions), *cert. denied*, 419 U.S. 829, 95 S.Ct. 49, 42 L.Ed.2d 53 (1974); *Dobbs v. Zant*, 720 F.Supp. 1566, 1568-69 (NDGa. 1989) (rejected evidence that jury may have considered prior convictions contrary to judge's instructions), *aff'd*, 963 F.2d 1403 (11th Cir.1991), *rev'd on other grounds*, __ U.S. __, 113 S.Ct. 835, 122 L.Ed.2d 103 (1993). *See generally* 65 ALR Fed. § 10 at 852 (1983). As noted by Chief Judge Sullivan in his separate concurrence, 41 MJ at 303, several state courts have held, even in capital cases, that evidence obtained from jurors concerning the deliberative process may not be used to impeach the verdict.

13. It may be improper even to ask jurors whether they followed the judge's instructions. *See United States v. Greer*, 620 F.2d 1383, 1385 n. 2 (10th Cir.1980). *See also* RCM 922(e) and 1007(c) ("Except as provided in Mil.R.Evid. 606, members may not be questioned about their deliberations and voting.").

Appellant argues that Fed.R.Evid. 606(b) and its military counterpart preclude inquiry only into the jury's compliance with substantive instructions such as what the jury may consider, but do not preclude inquiry into the jury's compliance with objective instruction such as voting procedures. This objective-subjective distinction was expressly rejected in *Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987). In *Tanner* the Supreme Court traced the legislative history of Fed.R.Evid. 606. They observed that Congress rejected an expansive House version of the rule which would have allowed juror testimony regarding "objective juror misconduct." The House version specifically drew a distinction between inquiry into "the mental processes" of jurors and "what happened in terms of conduct in the jury room." 483 U.S. at 123, 107 S.Ct. at 2749. The House

version would have allowed a juror to testify as to "what happened during the jury's internal deliberations, for example, where a juror alleged that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations." 483 U.S. at 123-24, 107 S.Ct. at 2749, *citing* S.Rep. No. 93-1277, 2d Sess., at 13-14, U.S.Code. Cong. & Admin. News 1974, pp. 7051, 7060. Congress rejected the House version and instead adopted the more restrictive Senate version, which prohibits all juror testimony about what occurred during deliberations, except for testimony about extraneous influences. 483 U.S. at 125, 107 S.Ct. at 2750.

The Supreme Court made it clear in *Tanner* that Fed.R.Evid. 606(b) is a blanket prohibition on juror testimony to impeach a verdict. The only exception in that rule is for evidence of extraneous influence. Absent that exception, a juror "may not testify as to *any matter* . . . occurring during the course of the jury's deliberations." Fed.R.Evid. 606(b) (emphasis added).

14. Fed.R.Evid 606(b) makes incompetent any testimony from jurors about the decision-making process of the jury as well as the mental processes of individual jurors. Following the Supreme Court's decision in *Tanner*, at least two federal Courts of Appeals have been refused to inquire into allegations of irregularities in jury voting procedures. In *United States v. Ortiz*, 942 F.2d 903, 913 (1991), *cert. denied*, __ U.S. __, 112 S.Ct. 2966, 119 L.Ed.2d 587 (1992), the Fifth Circuti rejected an affidavit of a juror alleging oral voting, voting on all counts together instead of voting on each count presented against each defendant, and alleging that the verdict announced in court, was not her verdict. The court in *Ortiz* specifically noted that the "the Advisory Committee notes accompanying 606(b) single out voting as such a 'component of deliberation.' " In *United States v. Ford*, 840 F.2d 460 (7th Cir. 1988), the court rejected evidence that votes were taken before all evidence was reviewed and "votes were cast verbally." The court held that it "will not inquire into the jury's

deliberative process, including arguments, statements, discussions, mental and emotional reactions, and *votes*, in the absence of a claim of external influence." *Id.* at 465 (emphasis added). Based upon the foregoing, we are satisfied that the overwhelming weight of authority prohibits inquiry into the voting procedures actually used by court members to arrive at a sentence.

Since Mil.R.Evid. 606 was taken from Fed.R.Evid. 606, that same blanket prohibition applies to testimony of court members about "any matter," including voting procedures, "occurring during the course of the deliberations." Accordingly, we hold that the affidavits of Colonel Aylor, Major Napoli, and Captain Williams may not be cpnsidered except for the limited purpose of determining if extraneous influence or unlawful command influence may have been injected into the deliberations. *United States v. Accordino*, 20 MJ 102, 105 (CMA 1985).

Appellant has not alleged that Colonel Aylor exercised unlawful command influence during the deliberations. Nevertheless, our dissenting brother detects "a distinctly disconcerting aroma" of unlawful command influence "emanating" from the affidavits of the court members. 41 MJ at 315 (Wiss, J.). We note first that the reference to unlawful command influence in Mil.R.Evid. 606 (b) is not limited to "external command influences." It also applies to "use of rank by a court member to pervert military justice." *United States v. Accordino*, 20 MJ at 104. *See United States v. Carr*, 18 MJ 297, 302 (CMA 1984) (allegation that president of court-martial used influence of rank to pressure other members during deliberations falls within "unlawful command influence" exception to Mil.R.Evid. 606 (b)).

15. Our review of the affidavits is limited to determining if there is any evidence of unlawful command influence. *United States v. Accordino, supra* at 105. We hold that the affidavits do not raise an issue of unlawful command influence in this case. Colonel Aylor was the president of the court-martial, and as such had certain administrative duties and discretion in the performance of those duties. His authority as president included "the discretion to call for a vote when, in [his] judgment, discussion of the issues is complete or further debate would be pointless." 20 MJ at 105. The affidavits reflect no more than Colonel Aylor's proper exercise of authority as president to preside over the deliberations. The affidavits also contain no evidence that Colonel Aylor used his "rank to 'enhance' an argument—*i.e.*, to coerce a subordinate to vote in a particular manner." *Id.* at 105. In this regard, it is important to remember that full and free discussion cuts both ways. "Senior ranking court members, like their jurors, are free to express their opinions in the strongest terms and to engage in the most robust discussions without fear of retribution or appellate sniping." *Id.*. at 105.

Our dissenting brother relies on the oral arguments of appellate counsel to conclude that "the command influence issue is squarely before the Court." 41 MJ at 315. Suffice it to say, oral arguments are not evidence. There must be more than a mere allegation of command influence to raise the issue; there must be evidence. *See United States v. Levite*, 25 MJ 334, (CMA 1987) (Cox, J., concurring) ("[A]n appellant's unsubstantiated assertion that unlawful command influence exists is not going anywhere. . . ."). There is absolutely no suggestion in the affidavits that Colonel Aylor exercised unlawful command influence.

16. We turn finally to appellant's argument that "death is different." Appellant argues that the nature of the death sentence requires heightened scrutiny of the process by which it is imposed. He cites the Supreme Court's observation in *McDonald v. Pless*, 238 U.S. 264, 268-69, 35 S.Ct. 783, 785, 59 L.Ed. 1300 (1915), "that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.' " *Mattox v. United States*, 146 U.S. 140, 148, 13 S.Ct. 50, 52, 36 L.Ed. 917 (1892), was cited to support this statement: We do not believe that *McDonald v.*

Pless, supra, supports appellant's argument. In *McDonald v. Pless* and *Mattox. v. United States* (a capital murder case), *both supra,* the Supreme Court was dealing with the common law rule "that a juror cannot impeach his own verdict," 238 U.S. at 267, 35 S.Ct. at 784, and they decided that an exception should be made where external influences on the jury were involved. Of course, that exception was later adopted in Fed.R.Evid. 606(b) and Mil.R.Evid. 606(b). We have found no authority for a capital-case exception to the general prohibition against jurors impeaching their sentence. In fact, the weight of authority is to the contrary. *Dobbs v. Zant*, 963 F.2d 1403, 1411 (11th Cir.1991) (refused to consider juror's testimony that jury arbitrarily imposed death sentence because they did not believe it would be executed), *rev'd on other grounds*, __ U.S.__, 113 S.Ct. 835, 122 L.Ed.2d 103 (1993); *Silagy v. Peters*, 905 F.2d 986, 1008 (7th Cir.1990) (refused to consider juror's testimony that jury did not believe a death sentence would be executed), *cert. denied*, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991); *Dobbs v. Zant*, 720 F.Supp. at 1468 (refused to consider juror's deposition that she voted for death sentence because of prior convictions which judge had instructed jurors not to consider), *rev'd on other grounds*, __ U.S. __, 113 S.Ct. 835, 122 L.Ed.2d 103 (1993). *See also Songer v. State*, 463 So.2d 229, 231 (Fla.1985) (refused to consider juror's testimony that she erroneously thought she could not consider nonstatutory mitigating factors).

One federal Court of Appeals appeared to recognize a "due process" exception to Fed.R.Evid. 606 in *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir.1987):

> The rule of juror incompetency cannot be applied in such an unfair manner as to deny due process. Thus, further review may be necessary in the occasional case to discover the extremely rare abuse that could exist even after the court has applied the rule and determined the evidence incompetent.

In fact, however, *Shillcutt* actually involved an external influence on the jury, *i.e.*, racial prejudice, and thus may not involve an exception to Fed.R.Evid. 606. *See Tobias v. Smith*, 468 F.Supp. 1287, 1291 (WDNY 1979) (racial prejudice is external influence).

17. Likewise, there is some authority for a "clerical error" exception, which may or may not fall under the "due process" umbrella, in which affidavits of a juror were received to show that the verdict announced was not the verdict "actually agreed upon." *United States v. Dotson*, 817 F.2d 1127, 1130 (5th Cir.1987), *revised in part on other grounds*, 821 F.2d 1034 (5th Cir.1987). There is no allegation of clerical error in appellant's case. Even if the affidavits are construed in the light most favorable to appellant, they fall short of suggesting that the multiple findings regarding aggravating circumstances, the balancing of aggravating circumstances against extenuating and mitigating circumstances, and the announced sentence are not what was actually agreed upon. At most, the affidavits of Colonel Aylor could be construed to suggest that the court members did not "revote" on the aggravating factors after their earlier unanimous findings. Accordingly, the clerical error exception does not apply to this case.

18. The only remaining question is whether this Court should carve out an exception for military capital cases. We decline to do so. We believe that invading the court-martial deliberations on the basis of the three affidavits proffered by appellant would be contrary to the intent of Congress in adopting Fed.R.Evid. 606(b), contrary to the intent of the President in promulgating Mil.R.Evid. 606(b), and contrary to the decision of the Supreme Court in *Tanner v. United States, supra,* and the overwhelming weight of authority among the federal courts which have considered the issue. Accordingly, we will not consider the affidavits or order further inquiry into the matters addressed by them. Moreover, in the absence of any competent evidence to the con-

trary, we hold that the court members followed the military judge's correct instructions on voting procedures to be followed during the sentencing deliberations.

ISSUE II

WHETHER APPELLANT WAS DEPRIVED OF HIS RIGHT TO A RELIABLE MENTAL HEALTH EVALUATION WHICH IN TURN DEPRIVED APPELLANT OF THE EFFECTIVE ASSISTANCE OF TRIAL DEFENSE COUNSEL IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, 10 USC § 855.

19. Appellant did not attack the qualifications of his sanity board at trial or before the Court of Military Review. He attacked his counsel before the Court of Military Review, contending that they were ineffective for not raising the issue of his mental responsibility. 34 MJ at 1067-68. Having lost before the Court of Military Review on the ineffectiveness-of-counsel issue, appellant now maintains that he was deprived of the effective assistance of counsel because his counsel relied on a defective sanity board.

On January 6, 1989, prior to his court-martial, appellant requested psychiatric assistance in accordance with *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) and *United States v. Toledo*, 25 MJ 270 (CMA 1987), *cert. denied*, 488 U.S. 889, 109 S.Ct. 220, 102 L.Ed.2d 211 (1988). On January 9, a sanity board was ordered in accordance with RCM 706 (Change 3). The sanity board was composed of two psychiatrists, Major David Orman, M.D. and Captain Richard Moczygemba, M.D.; and a clinical psychologist, Captain Lang Coleman. The board concluded that appellant had an antisocial personality disorder and a borderline personality disorder but no severe mental disease or defect.

The sanity board submitted its report February 6, 1989. On February 9, defense counsel repeated concern expressed earlier that appellant had an organic brain dysfunction. Captain Moczygemba, a member of the sanity board, agreed that appellant should be tested further and referred him to Dr. Pamelia F Clement, Ph.D., a clinical psychologist, for neuropsychological evaluation. Dr. Clement found no evidence of mental impairment.

CPT Moczygemba also requested radiologic testing to exclude possible organic brain defects. A CT scan was conducted on appellant, which showed no abnormalities. The sanity board issued an addendum on February 17 reflecting the additional testing. Def. App. Ex. C.

20. Defense counsel also requested funding to hire a defense psychiatric expert and later named the one they wanted. The request for funding was denied on January 27, 1989, but the Government offered a military psychiatrist as a substitute. After rejecting two military psychiatrists, the defense accepted COL David Armitage, a forensic psychiatrist, who holds professional degrees in both medicine and law. COL Armitage is Associate Chairman for Foresenic Science and Litigation Support, Department of Legal Medicine, Armed Forces Institute of Pathology, Washington, D.C., and Consultant Emeritus to the Surgeon General of the Army on Forensic Psychiatry. COL Armitage worked as a member of the defense team, was present at most of appellant's court-martial, and participated in *voir dire* of the court members.

After appellant was convicted and sentenced, appellate defense counsel obtained evidence that Captain Coleman, who had been identified in the sanity board report (¶ 3) as "Ph.D. clinical psychologist," did not receive his Ph.D. until May 1989 and was not licensed by the State of Wisconsin until September 1989. In response to the defense evidence, government appellate coun-

sel produced evidence that Captain Coleman completed all his educational requirement for his Ph.D. in the fall of 1988, even though he did not receive his degree until May of 1989 and that Captain Coleman was credentialed by the Army to serve as a clinical psychologist.

After trial, appellate defense counsel obtained several affidavits attacking the validity of the psychological and neuropsychological tests performed by Captain Coleman and Dr. Clement. An affidavit from Dr. Niles, Director of the Trauma Recovery and Counseling Center, Alexandria, Virginia, asserts that Captain Coleman erred by not conducting follow-up psychological tests for Post-Traumatic Stress Disorder. Dr. Niles further asserts that there are clear indicators that appellant suffers from post-traumatic stress disorder. Affidavits from Dr. H. Anthony Semone (psychologist) and Dr. James Merikangas (psychiatrist) assert that the neuropsychological testing conducted by Dr. Clement was performed improperly and thus is invalid.

21. The first question is whether appellant's constitutional right to have access to a competent psychiatrist has been infringed. In *Ake v. Oklahoma*, 470 U.S. at 83, 105 S.Ct. at 1096, the Supreme Court set out the standard:

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a signifiucant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the . . . defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. . . .

We hold that the *Ake* standard has been met in appellant's case. Appellant was given access to several competent psychia-

trists. Major Orman and Captain Moczygemba, whose credentials have not been attacked, evaluated appellant during his initial sanity board. Colonel Armitage, whose competence has not been attacked, participated throughout the trial as a member of the defense team.

The next question is whether the requirements of RCM 706 (Change 3) have been met. RCM 706(c)(1) provides that an inquiry into mental capacity or mental responsibility "shall be referred to a board consisting of one or more persons. Each member of the board shall be either a physician or a clinical psychologist."

22. We hold that the requirements of RCM 706(c)(1) have been met in appellant's case. A board consisting of a single psychistrist would have satisfied the rule. Furthermore, even assuming *arguendo* that CPT Coleman has not received his Ph.D. degree at the time he participated in the board, there is nothing in the rule requiring that a "clinical psychologist" possess a Ph.D. The record before us reflects that CPT Coleman was a trained psychologist, was credentialed by Army medical authorities as a clinical psychologist, and was assigned to duties as a clinical psychologist. RCM 706 was amended in 1986 to parallel prevailing federal practice of allowing use of clinical psychologists in mental status evaluations. Drafters' Analysis of RCM 706(c)(1), Manual, *supra* at A21-36 (Change 3). Unlike 18 USC § 4247(b), RCM 706(c)(1) does not specify that the psychiatrist or psychologist performing the evaluation be "licensed or certified." Nevertheless, in the absence of evidence to the contrary, the fact that CPT Coleman was credentialed by military medical authorities to perform duties as a clinical psychologist raises a presumption that he was qualified to do so. *See United States v. Masusock*, 1 USCMA 32, 35, 1 CMR 32, 35 (1951) ("presumption of regularity in the conduct of governmental affairs"). That presumption has not been rebutted in this case.

23. Next we must ask whether the post-trial affidavits warrant additional mental examinations pursuant to RCM 706(c)(4). We hold that they do not. While the defense experts attack the methodology of the mental health professionals who evaluated appellant, there is not one iota of evidence that appellant lacked mental responsibility at the time of the offenses or mental capacity at the time of trial.

Finally, we must address appellant's claim that he was deprived of effective assistance of counsel because they relied on a flawed examination into his mental health. While appellant has produced affidavits of experts who assert that the metholodogy was flawed, he has produced nothing to show that the results are incorrect. Disagreements among professionals do not *per se* show incompetence. Appellant has premised his ineffective-counsel argument on an *Ake* violation, which, as noted above, he has not shown. Since we hold that there was no *Ake* violation, we resolve this issue against appellant.

III

WHETHER APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT AT BOTH STAGES OF HIS BIFURCATED TRIAL.

Appellant alleges ten different errors that he asserts rise to the level of ineffective assistance of counsel as defined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We will analyze each alleged error separately.

A. *Trial defense counsel failed to conduct an adequate investigation and thus did not discover necessary and relevant information concerning appellant's drug and alcohol use prior to and during the offenses.*

24. Appellant contends that defense counsel failed to utilize the testimony of two potential witnesses. Ms. Gerlinde Joseph

and Ms. Beverly Sedberry. It is unclear from the post-trial affidavits of counsel whether defense counsel knew prior to trial what these potential witnesses would have said if called to testify.

In a post-trial affidavit, Ms. Joseph declared that on the night of December 12, 1988, she noticed appellant "drinking an entire bottle of Jack Daniels, and taking cocaine, hash, marijuana, and amphetamines." She further swore that "[h]e seemed to be taking anything that he could get his hands on. By the time he left, he was extremely intoxicated and high."

In a post-trial statement, Ms. Sedberry stated that on the day of the 7-Eleven robberies, appellant used cocaine. She also declared that on December 12, 1988, she knew "for a fact that he got some cocaine that afternoon. At the very least, Dwight was doing cocaine, marijuana and drinking." Def.App. Ex. R (Vol. IV, Appellate papers).

Appellant contends that defense counsel failed to properly investigate this evidence and failed to raise intoxication as a defense. Government appellate counsel argue that defense counsel's pretrial investigation of the case was reasonable.

25. The Supreme Court has stated that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." However, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland v. Washington*, 466 U.S. at 691, 104 S.Ct. at 2066.

In this case appellant told his counsel that "he had been drinking" alcohol "and smoking some marijuana prior to the murders," but that his marijuana and alcohol usage had "not intoxicated or affected" him during his crimes. Govt.App. Ex. R at 1. *See Mattheson v. King*, 751 F.2d 1432 (5th Cir.1985) (rejecting a post-trial attack on counsel's performance where appellant did not tell counsel he was intoxicated at the time of the offense),

cert. dismissed, 475 U.S. 1138, 106 S.Ct. 1798, 90 L.Ed.2d 343 (1986); *Bertolotti v. Dugger,* 883 F.2d 1503 (11th Cir.1989) (counsel not ineffective where he failed to raise voluntary intoxication defense to murder where defendant told police that he lied about his intoxication and where evidence of intoxication was not sufficient), *cert. denied,* 497 U.S. 1031, 110 S.Ct. 3296, 111 L.Ed.2d 804 (1990).

In post-trial affidavits, defense counsel have stated that they chose not to present evidence of voluntary intoxication for strategic reasons. Defense counsel discussed the possibility of an intoxication defense with a medical expert who advised against raising such a defense. The defense team was aware of psychological literature stating that criminals use "alcohol and drugs to 'get up their nerve' to commit crimes" and were concerned that appellant's use of drugs would be viewed as an aggravating factor rather than a mitigating factor. Govt.App. Ex. 2 at 7. *See Rogers v. Zant,* 13 F.3d 384 (11th Cir.) (decision not to investigate possible defense based on drug use was reasonable where counsel knew that local jury would likely react hostilely to such a defense), *cert. denied,* __ U.S. __, 115 S.Ct. 255, 130 L.Ed.2d 175 (1994); *Wilkins v. Iowa,* 957 F.2d 537, 541 (8th Cir.1992) (failure to present evidence of voluntary intoxication a "reasonable professional judgment[ ]" because jury might be unsympathetic to "self-induced intoxication").

Furthermore, defense counsel believed that a voluntary intoxication defense could be impeached by appellant's detailed confession and the detailed statements to the psychiatrist at the sanity board. These detailed recollections were not likely to come from a mind significantly diminished in capacity by drugs and alcohol, thus they would have made the defense appear contrived.

We hold that appellant has not satisfied the first prong of *Strickland v. Washington,* 466 U.S. at 687, 104 S.Ct. at 2064, by showing that his counsel's performance was deficient. Al-

though defense were aware of some evidence of voluntary intoxication, they chose not to pursue that defense. They have offered sound reasons for their decision, and we will not second-guess counsel after-the-fact. *Id.* at 689, 104 S.Ct. at 2065. *See id.* at 690-91, 104 S.Ct. at 2066 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.").

B. *Trial defense counsel failed to move to suppress appellant's confessions on the basis they were improperly coerced and involuntary.*

26. Appellant does not claim that he was interrogated without being advised of his rights, but rather that his confession was coerced. Mil.R.Evid. 304 states that, notwithstanding valid police warnings given pursuant to *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and Article 31, UCMJ, 10 USC § 831(b), involuntary statements made by an accused are *per se* inadmissible to prove guilt. Voluntariness is to de determined through a totality-of-the-circumstances test. *Blackburn v. Alabama,* 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960).

Appellant asserts four reasons why his confession was involuntary: (1) he was denied the opportunity to talk with an attorney; (2) CID threatened to deport appellant's girlfriend; (3) appellant was intoxicated; and (4) investigators consistently promised appellant that he could see his girlfriend. Appellant argues that his counsel was aware of these indicators of involuntariness but failed to move to suppress appellant's confessions.

Appellant's first reason is unsupported by the record. The record reflects that appellant was advised of his rights by SA Schnayerson, that he waived his rights to a lawyer in writing, that his confession was videotaped, and that appellant slept for 8

hours while the tapes were transcribed into a written statement. On the following morning appellant acknowledged in writing that he had again been advised of his right to a lawyer. He took about an hour to review the 14-page, single-spaced transcript of his interview, initialed each page, and then signed and swore to his statement. Other than his bare post-trial assertion, appellant has offered no evidence to contradict the evidence of record. On the basis of the record before us, we cannot fault counsel for failing to object to the confession based on a denial of counsel.

27. The second reason is likewise unsupported by the record. Appellant claims that this allegation is corroborated by the fact that his girlfriend was located in an adjoining room during part of appellant's confession where the police would have ready access to her passport. In fact, the record reflects that Ms. Pessina was at her home in Killeen while it was being searched at the same time appellant was being questioned at Fort Hood by the CID. Unfortunately for appellant, the record is devoid of any evidence that Ms. Pessina was threatened with deportation, that any such threats were communicated to appellant, or that appellant complained to his counsel or anyone else of any threats to deport his girlfriend. Indeed, in an affidavit, the lead defense counsel specifically denied that appellant told him about any mention of deportation or of appellant's being shown her passport during the interrogation. (Def.App. Ex. S at 3d page.) Appellant, however, asserts the contrary. (Def. App. Ex. T.)

Appellant also asserts that his confession was involuntary because he was intoxicated at the time of the confession. This assertion is also unsupported by the record. On the evening of appellant's arrest, he had been at work for 8 hours. Appellant gave a detailed and coherent confession, which was videotaped. After sleeping for 8 hours, appellant reviewed the transcript of his interview, signed it, and swore to it. We cannot fault counsel for failure to raise this baseless objection. *See Boggs v. Bair*, 892 F.2d 1193, 1199 (4th Cir.1989) (defendant's "confession was

not made inadmissible by any degree of intoxication he may have suffered the night in question," where the record supported findings that he was not "so intoxicated that his will was overborne"), *cert. denied*, 495 U.S. 940, 110 S.Ct. 2193, 109 L.Ed.2d 521 (1990).

Finally appellant asserts that his confession was coerced through promises that he could see his girlfriend, Nadia. Once again, the record does not support his assertion. The only evidence of record pertaining to this alleged coercion is SA Schnayerson's testimony that appellant asked to talk to Nadia and SA Schnayerson responded that it would be "no problem." Because the Killeen Police also were conducting interviews, appellant and Nadia "just never got together." *See Miller v. Fenton*, 741 F.2d 1456, 1467 (3d Cir.1984) ("promises by interrogators will not invalidate confession unless they are sufficient to overbear defendant's will"), *rev'd on other grounds*, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). We cannot fault counsel for failure to raise this unsupportable objection.

We hold that appellant's confession was properly received in evidence and that failure of defense counsel to seek suppression of appellant's confessions did not make their representation deficient.

C. *Trial defense counsel failed to move to suppress evidence which was unlawfully seized from Ms. Pessina's apartment.*

28. Appellant's girlfriend, Ms. Pessina, was approached by police investigators on the afternoon of December 13, 1988, and asked to come to the Killeen police station for questioning. She provided a written statement and signed a written consent to a search of her residence. The search yielded appellant's pistol, spent and unspent bullets, and a blood-stained man's jacket.

Ms. Pessina returned to the police station just before midnight on December 13-14 for further questioning, at which time

she made a second statement and again consented to a search of her residence, which resulted in seizure of a black ski mask, a pair of gloves, and a green BIC lighter.

Appellant argues that defense counsel's performance was ineffective in that he failed to move to suppress the evidence obtained during the two searches on the grounds that Ms. Pessina's consent was not voluntary. Since the written consent forms were not introduced in evidence, *see* Appendix I to Answer to Final Brief; and Pros. Ex. 104 for ID, we will not consider them to uphold the search but will consider them for the limited purpose of determining whether counsel were ineffective for failing to contest their efficacy. In each form, Ms. Pessina acknowledges that she was advised of her "constitutional right" to have a search of her property made only with a warrant and of her "right to refuse to consent to such a search." App. I, *supra*.

Ms. Pessina's testimony at trial suggests that she may not have understood that she had a right to refuse. What is clear is that she understood that her residence would be searched whether she consented or not.

Appellant bases his argument on primarily two factors: Ms. Pessina was unfamiliar with search and seizure procedures; and investigators coerced Ms. Pessina by telling her that if she did not consent, they could obtain a warrant anyway.

29. Where a claim of ineffective assistance of counsel is based on "defense counsel's failure to litigate a Fourth Amendment" objection to evidence, appellant "must . . . prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence. . . ." *Kimmelman v. Morrison*, 477 U.S. 365, 365, 106 S.Ct. 2574, 2583, 91 L.Ed.2d 305 (1986).

Assuming *arguendo* that appellant would have had standing to object to a search of Ms. Pessina's home, which is questionable, we hold that appellant has failed to demonstrate that a Fourth Amendment objection to the evidence would have been meritorious. While defense counsel could have challenged the validity of Ms. Pessina's consent, a motion to suppress would not have been meritorious for two reasons. First, an otherwise valid consent is not vitiated by a threat to obtain a warrant if the threat is well-founded. *United States v. Duran*, 957 F.2d 499, 502 (7th Cir.1992). Second, a search of Ms. Pessina's residence was inevitable.

The investigators' threat to obtain a search warrant was firmly grounded in that they had probable cause to search the residence. At the time of the first search, the investigators knew that appellant and Ms. Pessina fit the general description given by Mr. Harrison, the surviving cab driver. Mr. Harrison's destination when he was robbed and almost murdered was Ms. Pessina's residence. She had told police that she and appellant had taken a cab to her residence, that she exited at her residence while appellant purportedly continued in the cab to buy cigarettes, and that appellant returned to her residence after a short time and spent the night. Mr. Harrison remembered taking appellant and Ms. Pessina to the vicinity of 909 Mimosa Street and told police and his dispatcher that he observed his assailant going back toward Mimosa Street with the pistol and the fruits of his robbery. Under the circumstances, we hold that there was probable cause to search the premises at 909 Mimosa Street, making any police threat to obtain a warrant well-founded.

30. By the time of the second search, police also had found a cab driver's coin changer in appellant's field jacket, appellant had confessed, and in his confession he said that he left a green lighter taken from one of his victims in Nadia's residence.

Apart from the validity of Ms. Pessina's consent, it is clear that the items seized during the two searches were admissible because a search of her residence was inevitable. Mil.R.Evid. 311(b)(2); *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); *United States v. Kozak*, 12 MJ 389 (CMA 1982). While the search of Ms. Pessina's residence was ongo-

ing, appellant was confessing. In his confession, he told investigators that he had hidden the murder weapon and some of the fruits of the crime in Ms. Pessina's residence. We have no doubt that the fast-moving investigation of appellant's crimes would have included a search of Ms. Pessina's residence.

Appellant is not entitled to "a windfall" based on erroneous exclusion of evidence. *See Lockhart v. Fretwell*, __ U.S. __, __, 113 S.Ct. 838, 843, 122 L.Ed.2d 180 (1993). In this case the evidence was clearly admissible, and appellant's counsel were not ineffective for failing to object to its admission.

D. *Trial defense counsel failed to object to improper evidence of uncharged misconduct during findings.*

31. During the Government's case-in-chief, one of the court members asked Ms. Ira Printers, Ms. Pessina's roommate, if appellant had ever been physically violent towards Ms. Pessina. Without objection from defense counsel, Ms. Printers responded that she did not know about it beforehand, but found out during Ms. Pessina's statements to police that appellant had assaulted Ms. Pessina previously.

Defense counsel then submitted Ms. Pessina's sworn statements to police as defense exhibits without requesting that the references to physical violence be redacted. Furthermore, defense counsel did not object to admission of Ms. Pessina's hospital records concerning injuries allegedly caused by appellant. The same court member who questioned Ms. Printers about the physical violence asked about the hospital records which were then admitted as a defense exhibit without defense objection. Finally, defense counsel did not object to Ms. Pessina's testimony concerning the alleged assaults.

Appellant argues that the evidence of uncharged misconduct violated Mil.R.Evid. 404(b) and 403. The Government argues that the uncharged misconduct was admissible as rebuttal evidence under RCM 913(c)(1)(C).

32. This Court has set out a basic test for determining admissibility of evidence of uncharged misconduct. "The threshold question . . . 'is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime. . . .'" *United States v. Rodriguez*, 31 MJ 150, 155 (CMA 1990). If this threshold is crossed, the uncharged misconduct must meet a three-part test. First, the extrinsic evidence is not admissible unless it reasonably tends to prove that the accused committed the uncharged crimes, wrongs, or acts. *Id.* at 155. Second, the evidence must make some "fact that is of consequence to . . . the action more probable or less probable." *United States v. Ferguson*, 28 MJ 104, 108 (CMA 1989). Finally, the "probative value" of the evidence must not be substantially outweighed by "the danger of unfair prejudice" or confusion. *United States v. Reynolds*, 29 MJ 105, 109 (CMA 1989).

Appellant pays little attention to the threshold question and the first part of the test. Instead, appellant argues that the prior assaults on Ms. Pessina do not relate to a material issue in the case. *See United States v. Munoz*, 32 MJ 359, 364 (CMA) (Extrinsic evidence must relate to a "material issue" in the case.), *cert. denied*, __ U.S. __, 112 S.Ct. 437, 116 L.Ed.2d 456 (1991). Specifically, appellant argues that the assaults did not have anything to do with the murders, attempted murders, and robberies of unrelated persons. Furthermore, appellant argues that any probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

We hold that defense counsel were not deficient for failing to object to the evidence of uncharged misconduct, because such an objection would not have been meritorious. The overall defense approach was to portray Ms. Pessina as a manipulator who was deeply involved in appellant's crimes. Evidence depicting appellant as a person who abuses his girlfriend directly contradicted the defense's theory that appellant was under her domina-

tion. Furthermore, the probative value of such evidence does not appear to be substantially outweighed by danger of unfair prejudice.

E. *Trial defense counsel failed to present the defense of voluntary intoxication or to introduce any evidence, either on the merits or at sentencing, regarding appellant's mental condition at the time of the offenses.*

33. We hold that defense counsel was not deficient for failing to present evidence of voluntary intoxication, for the reasons stated with respect to sub-issue A, *supra* at 241. We hold that defense counsel was not deficient for failing to introduce evidence regarding appellant's mental condition for the reasons stated with respect to Issue II, *supra* 239.

F. *Trial defense counsel failed to object to improper aggravation evidence and improper instructions allowing the panel to consider "lack of rehabilitative potential" during the sentencing proceedings.*

34. During the sentencing hearing, the prosecution introduced evidence of appellant's unsatisfactory performance as a soldier, including three records of nonjudicial punishment under Article 15, UCMJ, 10 USC § 815, and one record of proceedings in which a suspension of nonjudicial punishment was vacated. The records show the following nonjudicial actions: (1) punishment imposed on May 19, 1987 for a 1-day unauthorized absence; (2) punishment imposed on July 31, 1987, for wrongful use of marijuana; (3) punishment imposed on October 4, 1988, for missing formation on three occasions and willfully disobeying a noncommissioned officer's order to lay out equipment for an inspection; and (4) an action dated October 28, 1988, vacating the suspension of the forfeiture imposed on October 4, because appellant broke restriction.

35. The prosecution also called Captain (CPT) Bush, appellant's battery commander, who testified about appellant's duty performance and disciplinary problems. CPT Bush testified that when he assumed command, approximately 1 year prior to appellant's court-martial, the outgoing commander and he discussed all the soldiers in the battery. The outgoing commander told CPT Bush that appellant "had been in trouble before and that he was somebody you might want to keep an eye on, but he seemed to be doing good at the time." During the early days of CPT Bush's command, appellant's "duty performance was pretty good, motivated, worked hard for his section chief. He stayed out of trouble, basically." In January of 1988, the unit recommended appellant for a medal because of his performance at the National Training Center. After a short while, "[h]e got involved with a—a woman downtown and he just started showing up late for formations and missing formations and problems like that." After counseling and other corrective actions failed, appellant received nonjudicial punishment from the battalion commander, and part of the punishment was suspended. CPT Bush testified that he believed "if we suspended [sic] him for the maximum amount of time it might break up the relationship with the woman he was hanging around with and that might help solve his problems." Within 10 days, the suspension was vacated because of further misconduct. At that point, CPT Bush decided to recommand that appellant be administratively discharged from the Army. When trial counsel asked, "How much rehabilitation potential did he have as a soldier?," CPT Bush responded, "At that point he had—in my opinion, he had none. There was nothing we could do for him."

On cross-examination, defense counsel further explored the effects of appellant's relationship with Ms. Pessina on his duty performance. CPT Bush testified that appellant responded to the leadership of Sergeant (SGT) Key and himself and "[h]e was doing well for a while." Appellant earned back the rank he had

lost. In the words of defense counsel, "And then Nadia came into the picture," after which appellant's performance deteriorated.

36. The military judge later instructed the members, without defense objection, that they could consider the evidence of appellant's nonjudicial punishment and CPT Bush's testimony as aggravating circumstances. The military judge also instructed the members that the military recognizes five principal reasons for sentencing those who violate the law: 1) "protection of the society from the wrongdoer"; 2) "punishment of the wrongdoer"; 3) "rehabilitation of the wrongdoer"; 4) "preservation of good order and discipline"; and 5) "deterrence of the wrongdoer and those who know of his crime and his sentence." Defense counsel objected only to the deterrence portion of the instruction.

Appellant now asserts that the failure of trial defense counsel to object to CPT Bush's testimony and the military judge's sentencing instruction constituted ineffective assistance of counsel. Appellant argues that CPT Bush's testimony concerning appellant's rehabilitative potential should not have been considered as an aggravating circumstance and that his defense counsel was deficient in not objecting to it.

Furthermore, appellant asserts that the judge erred in instructing the members to consider all five reasons for sentencing in the military since only two (punishment and deterrence of others) have been recognized to be appropriate in capital cases, and his defense counsel was deficient for failing to object to the instructions. *See Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 2929-30, 49 L.Ed.2d 859 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

37. Appellant buttresses his argument that rehabilitation evidence is not admissible in a capital murder case by citing *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). In a separate opinion, Justices Stevens, Brennan, and Marshall stated:

> In general, punishment may rationally be imposed for four reasons: (1) to rehabilitate the offender; (2) to incapacitate him from committing offenses in the future; (3) to deter others from committing offenses; or (4) to assuage the victim's or the community's desire for revenge or retribution. *The first of these purposes is obviously inapplicable to the death sentence.* The second would be served by execution, but in view of the availability of imprisonment as an alternative means of preventing the defendant from violating the law in the future, the death sentence would clearly be an excessive response to this concern. We are thus left with deterrence and retribution as the justification for capital punishment.

Id. at 477-78, 104 S.Ct. at 3171-72 (emphasis added). *See also Furman v. Georgia*, 408 U.S. 238, 306, 92 S.Ct. 2726, 2760, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring) (The death penalty "is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice."); *Beam v. Pasket*, 966 F.2d 1563, 1572 (9th Cir.1992) (A death sentence cannot be obtained unless the sentence is in furtherance of "its interest in retribution, in deterrence, or in the elimination of those likely to kill again."), *vacated*, __ U.S. __, 113 S.Ct. 1837, 123 L.Ed.2d 464 (1993), *rev'd on other grounds*, 3 F.3d 1301 (9th Cir.1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1631, 128 L.Ed.2d 354 (1994).

The Government, however, points to RCM 1001(b)(5), which states that the prosecution may present "evidence, in the form of opinion, concerning the accused's previous performance as a servicemember and potential for rehabilitation." *See United States v. Stinson*, 34 MJ 233 (CMA 1992) (In a sentencing hearing, an accused's potential for rehabilitation is a proper subject of testimony by qualified experts.).

38. We agree with the Government that appellant's nonjudicial punishment and CPT Bush's opinion about his duty

performance were admissible under RCM 1001(b)(2) and (5). *Cf. Barclay v. Florida*, 463 U.S. 939, 956, 103 S.Ct. 3418, 3428, 77 L.Ed.2d 1134 (1983) (evidence admissible to show that mitigating circumstance did not exist). CPT Bush's testimony arguably violated our prohibition against euphemisms for a punitive discharge in *United States v. Ohrt*, 28 MJ 301 (CMA 1989), but we do not find defense counsel's performance deficient for failing to object to it. Defense counsel had already presented the testimony of SGT Key, appellant's first-line supervisor on the merits. SGT Key had testified that appellant was "having problems" when SGT Key first arrived, but that he later responded to leadership and "was squared away for 12 good months." SGT Key testified further that "[w]hen he met Nadia, it went out the window." It is clear from the cross-examination of CPT Bush that trial counsel played into defense counsel's hands by reinforcing the defense proposition that appellant was obsessed with Ms. Pessina. Rather than object to the testimony, defense counsel used it to advantage by cross-examining CPT Bush to establish that appellant was developing into a good, responsible soldier until he fell under the spell of Nadia Pessina. In our view, this defense strategy was sound.

39. We turn next to the question whether the military judge erred by characterizing appellant's lack of rehabilitative potential as an aggravating circumstance. RCM 1004 creates two categories of aggravating evidence: a broad category of aggravating "circumstances" and a narrower category of aggravating "factors." RCM 1004(b)(4) (Change 2) provides:

> Death may not be adjudged unless:
>
> (A) The members find that at least one of the aggravating factors under subsection (c) existed;
>
> (B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and

> (C) All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under RCM 1001(b)(4), including the factors under subsection (c) of this rule.

RCM 1004 combines the two procedures generally employed by the states in capital cases. The states generally fall into two categories: "weighing" and "nonweighing." A "weighing" state balances extenuating and mitigating circumstances against statutory aggravating factors. A "nonweighing" state requires that a statutory aggravating factor be found in order to adjudge a death sentence, but does not require that it be weighed against extenuating and mitigating circumstances. RCM 1004 combines both processes, by first requiring that an aggravating factor be found, and then requiring that extenuating and mitigating circumstances be weighed against aggravating circumstances, which include the aggravating factors.

This Court has specifically opined that lack of rehabilitative potential is *not* an aggravating circumstance. *United States v. Aurich*, 31 MJ 95, 96-97 n. *See* RCM 1001(b)(4) and (5). Accordingly, we hold that the military judge's characterization of appellant's disciplinary record and CPT Bush's testimony as aggravating circumstances, as that term is used in RCM 1001(b)(5), was error.

40. Where, as in this case, the sentencing authority in a "weighing" jurisdiction has considered an invalid aggravating circumstance, an appellate court may either reweigh the circumstances or conduct a harmless-error analysis. *Stringer v. Black*, 503 U.S. 222, __, 112 S.Ct. 1130, 1136, 117 L.Ed.2d 367 (1992); *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

We hold that appellant was not prejudiced by the military judge's characterization of appellant's duty performance as an aggravating circumstance or by his counsel's failure to object to

that characterization, because the error was harmless. The Supreme Court has recently held that when ineffective assistance is alleged, "a criminal defendant alleging prejudice must show 'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' " *Lockhart v. Fretwell*, __ U.S. at __, 113 S.Ct. at 842, *citing Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. at 2064. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. at 374, 106 S.Ct. at 2582.

In the case before us, CPT Bush's evaluation of appellant's potential for military service pales in the context of the overwhelming evidence of a series of brutal murders and robberies. We are satisfied that the military judge's characterization of appellant's disciplinary record and CPT Bush's testimony as an aggravating circumstance did not prejudice appellant, especially in light of the defense strategy of attributing appellant's decline in performance to Ms. Pessina's domination. *See Zant v. Stephens*, 462 U.S. 862, 889, 103 S.Ct. 2733, 2749, 77 L.Ed.2d 235 (1983) (mislabeling aggravating evidence had " 'an inconsequential impact on the jury's decision regarding the death penalty' "). Furthermore, our review of the evidence presented and the arguments of counsel satisfy us that the decision to impose the death sentence was based on the facts and circumstances of the case rather than a numerical weighing of aggravating factors and circumstances against mitigating circumstances.

G. *Trial defense counsel failed to adequately investigate and ensure the accuracy and reliability of the pretrial sanity board and neuropsychological evidence before relying on the evidence.*

Based on defense counsel's exhaustive inquiry into appellant's mental condition, as outlined in our discussion of Issue II, *supra*

at 239, above, we hold that defense counsel fully complied with the requirement to "make reasonable investigations." *Strickland v. Washington*, 466 U.S. at 691, 104 S.Ct. at 2066.

H. *Trial defense counsel failed to request funds for a mitigation specialist or to present a cohesive, comprehensible background, social, medical, and environmental history for appellant.*

41. Appellant argues two points on this sub-issue; trial defense counsel failed to request funds for a mitigation specialist, and counsel failed to present all of the mitigation evidence available, including the testimony of Dr. Armitage.

Trial defense counsel did not utilize a mitigation expert. Instead, defense counsel conducted his own investigation and presented his evidence through lay witnesses, and then used his sentencing argument to link the evidence to an appropriate sentence. Through the testimony of appellant's father, mother, brother, and sister, and the affidavit of another brother, defense counsel established that appellant was the youngest of eight children. They produced evidence that appellant's father drank heavily, had a long police record, was physically abusive, did not know appellant's age or birthday, and left all responsibility for child rearing with appellant's mother. They established that appellant's mother worked nights to support the family until she could no longer work because of illness. Finally, using the testimony of family members as well as the testimony of a police officer from appellant's home town, they established that appellant grew up in an economically depressed, violent, drug-infested neighborhood with substandard schools.

Through the stipulated testimony of a teacher and appellant's school records, defense counsel established that appellant was academically substandard in high school and a frequent truant and disciplinary problem. Appellant was "moody and temperamental in the classroom" and "would easily flare up." Appellant's parents showed no interest in "his progress or problems."

Mr. Lord Johnson, a boxing coach, testified that appellant entered his program when he was 7 or 8 years old. Appellant trained hard and did well. They had a "beautiful relationship" until appellant left the program when he was 15 years old. Mr. Johnson opined that appellant could be "manipulated or controlled." Finally, Mr. Johnson testified that in his opinion appellant would not be a dangerous person if confined.

42. Finally, defense counsel called two noncommissioned officers from the Fort Hood Detention Facility, who testified that appellant presented no disciplinary problems while in pretrial confinement, that he was a good worker, and that he "adjusted well to confinement."

CPT Bush, during his testimony, established that appellant responded well to the leadership of SGT Key and was performing well until he became involved with Ms. Pessina.

The thrust of the defense case on sentencing was to convince the court-martial to confine appellant rather than execute him. The defense presented evidence to show that, if appellant were isolated from external influences and placed in a structured environment, he would not be dangerous and that, therefore, the needs of justice and society made his execution unnecessary.

In argument, defense counsel pointed out that appellant was the product of parental neglect and violent surroundings. Defense counsel portrayed appellant as a person of limited intelligence and arrested emotional development, who was a follower, manipulated and controlled by Ms. Pessina. Defense counsel emphasized that appellant, in spite of his upbringing, responded well to leadership of Mr. Johnson and SGT Key, adjusted well to confinement, and would not be a threat to society if he were confined.

43. Appellant asserts that mitigation experts are essential for capital murder cases. He argues that a mitigation expert would have been able to present all the appropriate evidence in a more logical and coherent order. He further asserts that the mitigating

factors presented should have been linked through expert testimony with the actions of appellant. Finally, appellant argues that the mitigating evidence presented was disjointed and piecemeal.

Trial defense counsel explains that his failure to present expert mitigation testimony was a tactical choice. Trial defense counsel specifically considered using expert testimony for the purpose of drawing "a nexus between" appellant's "past problems and his present conduct." COL Armitage, a forensic psychiatrist and a member of the defense team, stated in post-trial affidavits that he could have testified and "draw[n] a nexus between" appellant's past and the present and his "tendency to be led," but if he had done so, he also would have had to acknowledge on cross-examination that appellant had a classic "sociopathic personality" and could very easily commit similar crimes in the future. To prevent this damaging result, defense counsel avoided psychiatric testimony.

We hold that counsel's decision not to utilize Colonel Armitage's testimony or that of any other mental health professional was a reasonable tactical choice. *See White v. Singletary*, 972 F.2d 1218, 1225-26 (11th Cir.1992) (trial defense counsel did not provide ineffective assistance of counsel during penalty phase of capital murder prosecution by failing to present mitigation expert testimony on defendant's intoxication because it contradicted trial testimony regarding defense and because jurors generally disdain "drunkenness as an excuse for violent behavior"). The mere fact that defense counsel did not "shop around" for another more favorable expert does not render them ineffective. *See Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir.), *cert. denied*, __ U.S. __, 113 S.Ct. 419, 121 L.Ed.2d 342 (1992).

We hold further that defense counsel's investigation and presentation of defense mitigation evidence and their decisions regarding use of expert testimony were reasonable. While use of an analysis prepared by an independent mitigation expert is often useful, we decline to hold that such an expert is required

What is required is a reasonable investigation and competent presentation of mitigation evidence. Presentation of mitigation evidence is primarily the responsibility of counsel, not expert witnesses. In this case defense counsel investigated appellant's background and competently presented his evidence during the sentencing phase of the trial. Based on the advice of Colonel Armitage, defense counsel wisely used argument to link the evidence to appellant rather than use an expert who would be vulnerable to devastating cross-examination or rebuttal. This was not ineffective assistance.

I. *Trial defense counsel failed to object to improper government rebuttal evidence.*

44. Appellant contends that trial counsel elicited improper rebuttal evidence from two witnesses, Texas Ranger Aycock and Private Brown. As to Aycock, appellant asserts that it was improper to permit him to testify that, to the best of his knowledge, Ms. Pessina had no criminal activity in her past, that she was "not a suspect here," and that there was no state charges pending against her for concealing knowledge of the felony, making false statement to police, or possession of drugs.

Defense counsel had cross-examined CPT Bush about rumors of Ms. Pessina's drug use and involvement in criminal activity, including murder. This testimony was tendered by the defense to support their theory that Ms. Pessina was the instigator of appellant's crimes.

We hold that Ranger Aycock's testimony was proper rebuttal, and therefore defense counsel were not deficient in failing to object to it. In *United States v. Banks*, 36 MJ 150, 166 (CMA 1992), we explained that "the function of rebuttal evidence is to explain, repel, counteract or disprove the evidence introduced by the opposing party." Of course, proper rebuttal evidence must be restricted to the scope outlined by the evidence of the opposing side. *United States v. Hallum*, 31 MJ 254, 255 (CMA 1990). In this case Ranger Aycock's testimony rebutted the defense

evidence characterizing Ms. Pessina as a known criminal who exercised undue influence over appellant.

45. Appellant also asserts that his counsel failed to object to improper rebuttal testimony by Private Brown. Brown testified that, in private conversation, appellant told him that he "did it the first time to see if he could get away with it, and then he did it because it was fun." Brown testified further that he heard appellant say that if he could do it over again, "the only difference" would be that he would not "get caught." Appellant argues that this evidence was improper because the defense produced no evidence of remorse.

We hold that the evidence was proper rebuttal and that counsel were not deficient for failing to object to it. During cross-examination of SA Schnayerson, who had interrogated appellant regarding the offenses, defense counsel elicited testimony that SA Schnayerson had asked appellant hypothetical questions about the families of the victims, to which appellant responded that he was sorry. During sentencing argument defense counsel specifically mentioned appellant's remorse as a mitigating factor, arguing that "Agent Schnayerson, when he was interviewing Dwight over at the CID building, asked him about feelings for the family or feeling of remorse at that time and asked him if he was sorry, and he did say he was sorry. And that is what prompted the confession, that's when he made the confession and that—that is evidence of remorse." We hold that defense counsel opened the door to the issue of remorse during cross-examination of SA Schnayerson, making Private Brown's testimony proper rebuttal.

J. *Trial defense counsel were ineffective in failing to request a sentencing instruction which would properly inform the panel members that the only offenses which authorized the death sentence were felony murder and premeditated murder.*

46. During instructions on sentencing, the military judge instructed the panel that "a single sentence shall be adjudged for all of the offenses." He then properly instructed the panel that the court-martial was authorized to adjudge a sentence of death or the mandatory minimum sentence of life imprisonment. The military judge failed to instruct the panel, however, that death was an authorized punishment only for the offenses of premeditated murder. Defense counsel neither objected to the sentencing instruction nor requested a specific instruction identifying the offenses for which death was an authorized punishment.

The Government contends that the aggregate effect of the other offenses did not render the death sentence improper because the members' discretion was circumscribed by the three specific aggravating factors concerning which the judge instructed the members. Furthermore, the list of aggravating circumstances presented to the court members by trial counsel and the judge did not include the robbery or attempted murder offenses.

Appellant's argument is founded on this Court's previous cases in which we have held that the court members must be informed of the basis for permissible additional punishment if the additional punishment is permitted based on previous convictions or multiple offenses. *See United States v. Yocum,* 17 USCMA 270, 273, 38 CMR 68, 71 (1967) (must tell members punitive discharge (BCD) authorized because accused convicted of 2 or more offenses for which authorized total confinement is 6 months or more); *United States v. Hutton,* 14 USCMA 366, 370, 34 CMR 146, 150 (1964) (must tell members BCD authorized because accused had two or more previous convictions).

The factual premise for appellant's argument is that the court members did not know which offenses were punishable by death and, therefore, they sentenced him to death for an aggregate of offenses. Neither side's brief mentions the military judge's instructions on *findings,* in which he explained how to announce the vote on the four *capital* offenses. The four capital offenses

were specifically identified on the findings worksheet (App. Ex. CXXIII) and specifically identified by the military judge when he was instructing on the voting procedures for findings. The military judge called specific attention to pages 1, 3, 5, and 6 of the worksheet which identified the four capital offenses and contained specific instructions on how to announce whether the findings were unanimous with respect to those offenses.

47. While it might have been better practice for the military judge to again identify the offenses punishable by death in his sentencing instructions, we are unwilling to presume that the court members did not know that a "capital" offense is punishable by death. We note that defense counsel told the court members on general *voir dire* that "this is a capital murder case" and that "you may have to make a decision whether or not to confine . . . [appellant] in prison for the rest of his life, or to execute him." We hold that the military judge did not err by failing to repeat the portion of his findings instruction which identified which offenses were "capital." We further hold that defense counsel's failure to object or request additional instructinos was not ineffective representation within the meaning of *Strickland.*

K. *Cumulative error.*

Although not specificially asserted by appellant, we deem it appropriate to consider whether defense counsel's conduct of the trial as a whole might have been defective within the meaning of *Strickland,* even though individual oversights or mistakes standing alone might not satisfy *Strickland. See Frey v. Fulcomer,* 974 F.2d 348, 361 n. 12 (3d Cir. 1992) (prejudice determined by review of all of counsel's errors combined), *cert. denied,* __ U.S. __, 113 S.Ct. 1368, 122 L.Ed.2d 746 (1993). Our review of the entire record satisfies us that appellant was vigorously and competently defended.

ISSUE IV

WHETHER THE MILITARY JUDGE ABANDONED HIS ROLE AS A NEUTRAL OFFICER OF THE COURT THEREBY DENYING APPELLANT A FAIR TRIAL.

48. Appellant contends that the military judge denied him a fair trial by becoming an advocate for the prosecution. At the intial session of the court-martial under Article 39(a), UCMJ, 10 USC § 839(a), on January 31, 1989, defense counsel conducted an extensive *voir dire* of the military judge and then elected not to challenge him for cause at that time. At an Article 39(a) session on March 16, 1989, defense counsel challenged the military judge for cause based on adverse rulings and comments by the military judge at preceding pretrial sessions.

It is axiomatic that a military "judge may not abandon" his "impartial" role and "assist" the prosecution. *United States v. Reynolds*, 24 MJ 261, 264 (CMA 1987). On the other hand, the military judge "is not a mere figurehead" or "simply an umpire in a contest between the Government and accused." *United States v. Kimble*, 23 USCMA 251, 253, 49 CMR 384 (1974). The military judge has the responsibility "exercise reasonable control over the proceedings." RCM 801(a)(3). He "should prevent unnecessary waste of time and promote the ascertainment of truth, but must avoid undue interference with the parties' presentations or the appearance of partiality." RCM 801(a)(3), Discussion. Because "jurors are ever watchful of the words that fall from him," a military judge must be circumspect in what he says to the parties and in how examines witnesses. *United States v. Clower*, 23 USCMA 15, 18, 48 CMR 307, 310 (1974), *quoting Bollenbach v. United States*, 326 U.S. 607, 612, 66 S.Ct. 402, 405, 90 L.Ed. 350 (1946).

RCM 902(a) provides that "a military judge shall disqualify himself or herself in any proceeding in which that military judge's

impartiality might reasonably be questioned." RCM 902 is based on 28 USC § 455 and contains substantially the same language. Drafters' Analysis of RCM 902, Manual, *supra* at A21-45. The standard of appellate review of the recusal decision is abuse of discretion. S. Childress & M. Davis, 2 *Federal Standards of Review* § 12.05 at 12-37 (2d ed. 1992). The standard is based on "the 'reasonable person' test: if a reasonable person would not question the judge's impartiality on the basis of the facts presented, then it is not an abuse of discretion for the judge to deny the motion for recusal." *Id.* at 12-38.

49. Appellant has asked this Court to consider the military judge's "track record" and has cited nine cases in which the military judge has allegedly exhibited pro-government conduct. Final Brief at 155-57. We decline to decide this case on the basis of the military judge's "track record." In the first place, we do not regard nine cases as a representative sample of the record of an experienced trial judge. Second, our obligation is to review the record of trial in this case, not that in other decided cases, to determine if the military judge was partial in this case. *See Liteky v. United States*, __ U.S. __, __, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994) ("[J]udicial rulings alone almost never constitute [a] valid basis for a bias or partiality motion."), *citing United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966).

In support of appellant's assertion that the military judge "has a track record of pro-government conduct," Final Brief at 155, appellate defense counsel assert that the military judge "had reason to celebrate with the prosecution, law enforcement agents, and the murder victim's familiies the very night appellant was sentenced to die." Final Brief at 157-58. This accusation is based on an affidavit from former-Captain Ibbotson, lead defense counsel, in which he asserts, "After the verdict was announced, the prosecutors held a party." Mr. Ibbotson further asserts, "The defense later learned that, in addition to the prosecutors, inves-

tigators and family members, the Military Judge attended as an invited guest." Def.App. Ex. S. Mr. Ibbotson does not disclose the source of his information. The defense has produced no direct or corroborating evidence of this assertion.

The Government countered with an affidavit from Lieutenant Colonel (LTC) (then-Major) Ley, the lead prosecutor and one of the alleged sponsors of the party. LTC Ley asserts unequivocally, "There was no party." Govt.App. Ex. 6, ¶ 2. After comparing Mr. Ibbotson's accusation based on hearsay with LTC Ley's denial based on personal knowledge, we conclude that further inquiry is not warranted.

We turn next to appellant's specific allegations regarding the military judge's conduct of the trial, which we discuss *seriatim*.

A. *The military judge refused to allow appellant access to information showing inaccurate media coverage which bore upon the advisability of changing venue.*

50. At trial appellant requested a change of venue, which the military judge denied. Appellant also requested funding for a "clipping service" and subpoenas to the news directors of all local television stations in order to obtain videotapes of television coverage regarding the charges against appellant. These requests were denied as unnecessary after the military judge received assurances from the Government that the Fort Hood Public Affairs Office would make all news clippings and videotapes of television coverage available to the defense. We hold that the record does not support appellant's allegation that he was refused access to relevant information.

Appellant also asserts that the military judge demonstrated bias by stating that his ruling on the requested change of venue "wouldn't change by my viewing any of these television reports of this trial." The military judge stated that the defense would be permitted to raise the venue issue again if *voir dire* of the court members indicated that they had been influenced by pretrial publicity and that he would liberally grant challenges based on exposure to pretrial publicity.

We note that the military judge's ruling was unsuccessfully challenged before the Court of Military Review. 34 MJ at 964-65. Appellant now asserts that the military judge's treatment of the issue reflects bias against him.

We do not regard the military judge's statement as a demonstration of bias, but rather as a reflection that he correctly understood the law. Pretrial publicity does not necessarily establish that court members have been influenced. The question is whether the members, having been exposed to publicity, can "fairly and honestly try the issues." *United States v. Vigneault,* 3 USCMA 247, 255, 12 CMR 3, 11 (1953). It is only when pretrial publicity creates "so great a prejudice against the accused that the accused cannot obtain a fair and impartial trial" that he is entitled to a change of venue. RCM 906(b)(11), Discussion; *United States v. Gravitt,* 5 USCMA 249, 256-57, 17 CMR 249, 256-67 (1954).

B. *The military judge accused defense counsel of being unethical and manipulating the speedy trial clock.*

51. Appellant's argument is based on an exchange regarding a trial date. After listing what needed to be done, defense counsel argued, "There's an awful lot of things hanging here, and it seems unfair to make the defense go to trial on the 27th and say we're held to any delay." Trial counsel retored, "Your Honor, we're not . . . opposing a defense delay, but I get the feeling that the Government is being maneuvered here into somehow the defense saying, 'I'm not ready to go, we're going to need to evaluate a lot of different things; but somehow, it should all be accountable to the Government.' " The military judge responded:

> Well, that's my perception exactly. Certainly, you fellows aren't trying to maneuver the system, are you? If

you want delay, I'd be more than happy to give you delay. If you want time to check out these things, be my guest; take whatever time you feel is necessary. But in my view so far, the Government has been extremely cooperative with you. If you want more time, as I say, just ask.

To the extent that the military judge perceived that the defense was attempting to gain additional preparation time without foregoing a possible speedy-trial motion, we agree with appellant that defense counsel were "accused" of attempting to use the speedy-trial rules to their advantage. We disagree, however, that the military judge's use of the term "maneuver" amounted to an accusation of unethical conduct.

C. *The military judge suggested to trial defense counsel that he should use an inadequate expert to prepare for trial.*

52. The allegation is unsupported by the record. After the defense requested expert assistance, the Government proffered two medical officers in succession who were unacceptable to the defense. The military judge declined to force the defense to accept them. A third medical officer, Colonel Armitage, was offered by the Government and was acceptable to the defense. The basis of the controversy was not being forced to accept an "inadequate expert"; the basis of the controversy was whether, for speedy-trial purposes, the delay in finding an acceptable expert would be charged to the defense.

D. *The military judge ignored prosecutorial misconduct in excusing a pro-life court member without cause.*

LTC Hardie was detailed to be a court member in appellant's case on February 14, 1989. On February 21, appellant requested enlisted members. On February 23 LTC Hardie completed an extensive "Court-Martial Member Questionnaire" in which he

wrote, "I have morale [sic] reservations regarding capital punishment." On March 23 appellant changed his mind and requested an all-officer court. On March 24, LTC Hardie "faxed" a handwritten request for excusal from court-martial duty to the convening authority, reciting that he had been notified just that morning that he was required to be present for court-martial duty. LTC Hardie, a battalion commander at Fort Sill, listed training commitments scheduled to begin on March 30 which could not be rescheduled because of short notice. Also on March 24, the division staff judge advocate (SJA) submitted a decision paper and a list of nominees to the convening authority. The convening authority relieved the enlisted members and appointed five more officers. LTC Hardie was not reappointed.

53. Appellant's accusation that the military judge ignored prosecutorial misconduct is unsupported by the record. In the first place, there is no evidence of prosecutorial involvement in the selection of court members. All correspondence was between the SJA and the convening authority. Furthermore, there is no evidence that the convening authority was aware of the questionnaire, which apparently was sent out by counsel and returned to counsel in preparation for *voir dire* of court members. Finally, even if the convening authority had been aware of the questionnaire, he would have been justified in not appointing LTC Hardie to sit on appellant's case, because LTC Hardie would not have been "best qualified" within the meaning of Article 25, UCMJ, 10 USC § 825, by virtue of the likelihood of his being challenged for cause based on his moral opposition to the death penalty. *See United States v. Curtis*, 33 MJ 101, 106-07 (CMA 1991) (juror subject to challenge for cause if "religious views or moral scruples" against death sentence would prevent giving "meaningful consideration to impose a death penalty"), *cert. denied*, __ U.S. __, 112 S.Ct. 1177, 117 L.Ed.2d 421 (1992); RCM 503(a)(1), Manual, *supra* at A21-25 (convening authority should avoid detailing members who would be subject to challenge for cause).

E. *The military judge restricted defense counsel's voir dire and chastised him in the presence of a court member.*

Appellant's assertion involves three issues: (1) whether the military judge improperly restricted *voir dire*; and (2) whether the oral exchanges between defense counsel and the military judge reflect that the judge was biased; and (3) whether the military judge prejudiced appellant by scolding defense counsel in the presence of a court member.

1. *Restrictions on voir dire.*

Prior to trial each court member completed and submitted a 7-page "Court-Martial Member Questionnaire," consisting of 35 questions covering personal and family history, civilian and military education, past duty assignments, non-military employment, awards and decorations, volunteer work, previous contacts with the legal system, hobbies, memberships in organizations, and reading habits. These questionnaires were submitted to trial counsel and used by counsel for both sides.

During general *voir dire*, defense counsel asked about familiarity with the evidence, witnesses, and court personnel; court-martial experience; hobbies and reading habits; associations with judges, lawyers, and policemen; attitudes about capital punishment; and general attitudes toward sentencing.

After general *voir dire* was completed, the military judge asked counsel for both sides how much time they needed for individual *voir dire*. Trial counsel anticipated "a few moments," but defense counsel anticipated 45 minutes per member. The military judge then scheduled the members for individual *voir dire* at 30-minutes intervals, closed the court, and moved *voir dire* to a more informal setting in another room.

54. The first court member, LTC Dobbs, was then questioned individually for 57 minutes by both sides, without comment or interruption by opposing counsel or the military judge.

Questioning by trial counsel included civilian education, prior experience as a crime victim, previous military assignments, attitudes toward the criminal justice system in general and capital punishment in particular, as well as his attitude toward conflicts between court-martial duty and other duties.

Defense counsel then questioned LTC Dobbs about his career as a public affairs officer in the Army, other military assignments, family history, participation in sports, volunteer work, attitude toward bumper stickers, reading habits, prior court-martial experience, personal values, capital punishment, and race relations.

After LTC Dobbs was excused, the following exchange took place between the military judge and defense counsel:

> MJ: . . . You guys are going to have to hold down this process (to defense). I'm not going to take an hour for every one of these guys. For example, I'm having great difficulty understanding why you need to know whether a court member has done any volunteer work, put stickers on his car, anything about a divorce, concept [sic] with the enemy in time of war, thoughts on boxing. This process is going to have to be streamlined; because as I say, I'm not going to allow you to have an hour for each one of these guys, with questions like that. Can we get to the core issues? Be my guest and get to those core issues, and do it quickly. So let's jettison some of this stuff that I see as non-essential. Those are just some indications of what I think is non-essential information.
>
> IDC: Sir, in the ones you pointed out there, we have certain reasons why we asked some of those questions. I can—just to give you an example on the stickers. When somebody has a sticker on there that, you know, "my wife, yes; my dog, maybe; my gun, never," or something like that, it tells a little bit about the—

MJ: Ask them about gun control, or something like that. We're not going to go through all of this stuff here. And volunteer work, tell my why you need to know about his volunteer work; clue me in on that one.

[No response from the defense.]

MJ: Well, my point exactly.

DC: No, sir. Well, sir—

MJ: Well, then answer.

DC: Sir, we've consulted with [a] jury consultant on this, as well as our expert, and we feel that this discloses attitudes of the panel, just as the attitudes on divorce, and these other matters. Many of these matters directly have to do with certain mitigating evidence we plan on presenting in this case, as does boxing. It all ties into specific elements and the mitigating evidence we plan on presenting, and their attitudes—or lack of attitude—on these issues is important. We'll drop the part on volunteer work if you insist. We'd just note on the record that we're not able to ask about this. . . .

MJ: Well, I feel that you're wasting time.

DC: Okay, sir.

MJ: Do not waste time. Get to the core issues. Let's move on quickly. Let's not ask these people their entire life history; that's not the design behind voir dire. The design is whether they can sit as an impartial court member.

The individual *voir dire* of the second court member, LTC Griffith, then commenced. Questioning followed the same general pattern and covered the same topics as with LTC Dobbs. Neither opposing counsel nor the military judge interrupted until near the end of the *voir dire*, when defense counsel asked about boxing. The military judge interjected and the following exchange occurred:

MJ: Didn't I tell you, no? I could have sworn I said, don't do that. What is this, open defiance here?

DC: No, sir.

MJ: What are you doing then?

DC: As I've explained to you, some of the key elements in our mitigation case involve—in fact, one of our witnesses, a boxer—

MJ: Answer the question. What are you doing?

DC: I thought that I explained to you about that, sir.

MJ: You can asked [sic] one boxing question, and that's it. That's all the question [sic] you can ask.

Defense counsel then asked LTC Griffith what he thought about boxing, and LTC Griffith gave a lengthy and detailed response.

55. After LTC Griffith was excused, defense counsel asked the military judge to examine their *voir dire* outline and indicate which questions he considered irrelevant or objectionable. Defense counsel then pointed out to the military judge that LTC Griffith had reacted to the military judge's interruption of the questioning about boxing. The military responded:

Call him back and ask him. I'm not going to be defied at this court-martial. When I tell you guys to do something, I expect you to do it. I said no boxing questions. You mentioned boxing would be an issue, or something you would present during extenuation and mitigation. That was what I understood.

The military judge then asked defense counsel to explain why questions about boxing were important. After considerable discussion, defense counsel explained that one of the defense witnesses would be appellant's boxing coach and that the coach's "evaluation of" appellant's "character is inextricably tied to the sport of boxing." Defense counsel then repeated their request that the military judge annotate their *voir dire* outline. The military judge responded:

> Well, I'm not going to waste my time doing that. Ask the questions you want to ask. I'll do this, though. I'll jump in and tell you when to stop, when I think you're just wasting time. I'll allow you to ask a boxing question, then, if you think it's so important to your case. Let's not explore every punch that's ever been thrown by a man here. Let's just ask a nice, brief, brisk question on boxing.

The remainder of *voir dire* was conducted without controversy or interruption, except for one question by trial counsel to which the military judge responded, "An unfair question," and one time when the military judge interrupted a series of defense questions about the importance of schools by interjecting, "Last question in that area. Move on." The next six court members (Major (MAJ) Napoli, MAJ Wilson, CPT Williams, CPT Weiss, Chief Warrant Officer (CW)4 Giebner, and CW3 Hasenauer) were asked substantially the same questions, including questions about boxing, without interruption. Four court members (LTC Thomas, LTC Keating, LTC Aylor, and MAJ Staples) were not asked about boxing.

LTC Keating was challenged for cause and excused. LTC Griffith, the only court member who witnessed any of the exchanges between defense counsel and the military judge, was challenged peremptorily by trial counsel. LTC Thomas and LTC Dobbs were peremptorily challenged by defense counsel.

56. When this Court reviews a military judge's limitations on *voir dire*, we "should reverse only when a clear abuse of discretion, prejudicial to a defendant, is shown." *United States v. Smith*, 27 MJ 25, 28 (CMA 1988), *quoting United States v. Parker*, 6 USCMA 274, 280, 19 CMR 400, 406 (1955). *See* RCM 912(d), Discussion ("The nature and scope of the examination of members is within the discretion of the military judge").

We hold that the military judge did not abuse his discretion in this case. Virtually no topic was off-limits for *voir dire*. Even questions about boxing, the basis of all exchanges between the military judge and counsel, were permitted after defense counsel explained the relevance of the questions.

2. *Bias of the military judge.*

In order to constitute grounds for reversal, a "judge's bias" against a party "must be personal and extrajudicial." *McWhorter v. Birmingham*, 906 F.2d 674, 678 (11th Cir.1990). *See Liteky v. United States*, __ U.S. __, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Generally, courtroom clashes between counsel and the judge do not constitute disqualifying bias. *In re Cooper*, 821 F.2d 833, 838 (1st Cir.1987). *See Liteky v. United States*, __ U.S. at __, 114 S.Ct. at 1157 ("expressions of impatience, dissatisfaction, annoyance, and even anger" not sufficient to disqualify judge). Where bias is alleged to be against an attorney rather than a party, it must be so virulent "that the judge's impartiality toward the client may reasonably be questioned." 821 F.2d at 839; *United States v. Jacobs*, 855 F.2d 652, 656 n. 2 (9th Cir.1988). Applying these principles, we hold that the clashes between defense counsel and the military judge regarding the scope of *voir dire* were not sufficient to disqualify the military judge.

3. *Chastising defense counsel in the presence of a court member.*

57. The record reflects that defense counsel were not chastised in the presence of any court member who sat on appellant's case. All exchanges between the military judge and counsel during *voir dire* were out of the presence of the members, except for one exchange. That was in the presence of LTC Griffith, who was peremptorily challenged by the prosecution, thus mooting any question of prejudice.

F. *The military judge sarcastically criticized defense counsel in the presence of the court members when defense counsel objected to inadmissible hearsay testimony of the medical examiner.*

This assertion is unsupported by the record. The exchange in question did not start with an "objection" by defense counsel, but with the following comment as the pathologist began to read from a report that had not been marked as an exhibit: "Uh-sir, it might be good, just for the record, that she's referring to some notes—I believe it's the autopsy report." The military judge responded, "Don't interrupt, will you please?" The military judge then turned to trial counsel and asked, "[D]o you want to get that into evidence, first, so that the doctor can talk from it?" After laying an incomplete foundation, trial counsel offered several documents in evidence. The military judge commented, "Well, it's slightly premature; but, do you have any objections to it, defense?" Defense counsel responded, "Well, we'd agree with you, sir; but we don't have any objections to it being admitted."

In our view the record does not reflect hostility to the defense, but impatience with both sides as trial counsel was having difficulty with what should have been straightforward testimony of a pathologist on an uncontested issue: the cause and manner of death of Private (PVT) Fay. While the military judge demonstrated impatience with both counsel, his comments fall far short of the "verbal abuse" alleged by appellant. Final Brief at 144-46. *See Litkey v. United States, supra* (impatience not sufficient to disqualify judge).

G. *The military judge allowed a murder victim's wife to testify as to cumulative matters.*

58. During a preliminary session prior to arraignment, the military judge ruled that he would permit non-witness members of the victims' families to sit in the courtroom, but would caution them against any displays of emotion or opinion. During the prosecution case on the merits, trial counsel called Mrs. Sharbino, widow of the victim Bobby Sharbino, to testify. Defense counsel remarked, "Your Honor, we would just note, for the record, our earlier comments—at this juncture." The "earlier comments" referred to defense counsel's concern that family members of the victims might influence the court members by making comments or "doing something physically." The military judge did not respond.

Mrs. Sharbino then testified for the limited purpose of identifying Mr. Sharbino's money bag and wallet. After Mrs. Sharbino was excused, defense counsel asked for and received a side-bar conference, where he stated: "We renew our objections to the testimony of the previous witness—" The military judge responded, "Don't waste my time . . . Your objection's on the record. Her demeanor was neutral: She didn't cry; she didn't raise her voice; she didn't use any hand gestures . . . [A]s a matter of fact, she was rigid, [o]n the stand." Defense counsel then protested, "She had little eye-contact, but she began to lose her voice, and her control." The military judge concluded the sidebar by stating, "She had only eye-contact with the prosecutor, when he was asking questions. Let's drive on here."

Based on this exchange, appellant now argues that the military judge "torpedo[ed]" a defense objection to victim-impact

testimony with an "order to sit down and 'don't waste my time.' " Appellant argues that "[t]he message to the panel was clear, appellant's life was worthless and to put up a defense was an inconvenience to the judge's valuable time." Final Brief at 145.

59. This argument misstates the record on several counts. First, defense counsel did not lodge a specific objection prior to Mrs. Sharbino's testimony. Second, Mrs. Sharbino did not give victim-impact testimony; she merely identified two items of real evidence which had been found in a trash container. Third, counsel were not told to "sit down." Fourth, there was no message sent to the panel members because the exchange occurred in a side-bar conference out of the hearing of the members. The members were unaware that there was any controversy about Mrs. Sharbino's testimony.

We are satisfied that the military judge did not abandon his impartial role by allowing Mrs. Sharbino to testify. Her neutral testimony on an uncontested matter was admissible and did not unfairly prejudice appellant as to findings.

H. *The military judge allowed a surprise government witness to testify without adequate notice or discovery to the defense.*

On December 28, 1988, and January 7, 1989, defense counsel filed discovery requests for, among other things, "[a]ny statements, confessions, or admissions by the accused"; "[t]he name, identity, and current location of any informant"; and "[a] list of the names, addresses, and telephone numbers for all witnesses . . . on the merits or sentencing. . . ." On February 25, 1989, the military judge ordered the Government to disclose the identity of all informants to the defense. On March 24, 1989, trial counsel notified the defense that Private Forrest Brown, an inmate at the U.S. Army Correctional Activity at Fort Riley, Kansas, was a possible prosecution witness. On March 26, defense counsel filed a motion *in limine*, asking that the prosecution be prohibited from introducing the testimony of Private Brown "until the Government complies with all discovery requests submitted by the defense in this case and the defense is given an opportunity to interview and confront this witness against Private Loving."

At an Article 39(a) session on March 27, the military judge asked trial counsel if he was "attempting to provide the information requested by the defense." Upon being told that virtually everything the defense requested was available through Private Brown's former unit and his court-martial record, the military judge then ordered the prosecution to call Private Brown's former unit and to provide the record of trial pertaining to Private Brown's court-martial to the defense.

60. During the sentencing hearing, Private Brown testified for the prosecution, without further objection by the defense. He was asked if appellant said "anything about how he felt about the shootings." Private Brown responded:

> I believe he said--I—we were talking and I believe he said—I asked him why he did something like that—I thought he was joking or he wasn't serious or he was bragging—he said—he did the first—did it the first time to see if he could get away with it, and then he did it because it was fun, and then he said something along the lines, "Because love makes you do crazy things."

Private Brown testified that at a "later time" he heard appellant say "if he had to do it over, the only difference is he wouldn't get caught." On cross examination defense counsel questioned PVT Brown about his court-martial conviction, his pretrial agreement, and other drug offenses for which Brown was investigated but not tried. In a post-trial affidavit, MAJ Hayden, individual defense counsel, states that the defense was "notified" about PVT Brown "the night before [the Government] presented rebuttal testimony." PVT Brown was interviewed by CPT Ibbotson, the

lead defense counsel. MAJ Hayden states, "In hindsight, I would have liked more time to investigate PVT Brown." Def.App. Ex. Y. The defense did not request additional time.

RCM 701(a)(5)(B) requires the prosecution to disclose sentencing witnesses upon defense request. If a party fails to comply with the discovery rules, RCM 701(g)(3) empowers a military judge to "[o]rder the [noncompliant] party to permit discovery"; "[g]rant a continuance"; exclude the evidence; or "[e]nter such other order as is just under the circumstances."

Appellant now argues that the military judge demonstrated an "apathetic attitude over a government surprise witness, Private Brown." He also argues that the military judge "idly ignored defense counsel's motion to exclude his testimony for failure to provide adequate notice." Final Brief at 147.

The record in this case does not reflect noncompliance. Trial counsel disclosed the witness on March 24, 1989. There is no evidence of an attempt to ambush the defense. *See generally United States v. Dancy*, 38 MJ 1, 5 n. 3 (CMA 1993) ("[D]iscovery rules are intended to eliminate . . . "gamesmanship.' "). Since the defense case did not begin until March 30, the defense had time to adjust their strategy. Private Brown did not testify until April 1. Defense counsel interviewed the witness prior to his testimony and did not request additional time or other relief. The record does not support appellant's accusation of an "apathetic attitude" or "idly ignor[ing]" defense counsel's motion. To the contrary, the military judge acted on the motion and directed the Government to comply.

I. *The military judge restricted trial defense counsel's direct examination of Ms. Pessina so that she would not be viewed as an accomplice.*

61. There are two elements to this sub-issue. Appellant contends that (1) Ms. Pessina was an accomplice and should have been treated as such on cross-examination and in the military

judge's instructions; and (2) Ms. Pessina, although called by the defense, was a hostile witness.

1. Ms. Pessina as an accomplice

Confronted with overwhelming evidence of guilt, defense counsel wisely focused on avoiding a death sentence. Integral to the defense strategy was an effort to shift the focus from appellant to Ms. Pessina. In his opening statement defense counsel asked the court members to look for "any evidence of Dwight Loving's motivation of what was pushing him toward this crime." Defense counsel urged the members to "[l]ook at the involvement of Nadia in this, and his viewing of that incident; and, see how it all fits together. . . . Look at who needed the money. Look at who had the real agenda for these crimes; who was the idea behind all of this."

62. Appellant asserts that the following evidence supports his argument that Ms. Pessina was an accomplice:

(1) she and appellant were lovers;

(2) she needed money;

(3) she drove the car for the 7-Eleven robberies;

(4) she used money from the robberies to buy cocaine;

(5) before the cab driver murders, appellant told her that he was going to kill someone for money;

(6) appellant told her about the murders and showed her some of the proceeds;

(7) she slept with appellant after he confessed his crimes to her;

(8) the murder weapon and other evidence were found "littered throughout her home";

(9) she lied to the police;

(10) her letters to appellant in prison expressed concern about their being screened by prison authorities;

(11) Mr. Harrison heard her "crinkling" something in the backseat of his cab, which probably was the pistol concealed in

paper bag, and the murder weapon was later found in a crinkled paper bag outside her home;

(12) as they exited Mr. Harrison's cab, she asked appellant, "Have you got everything?";

(13) it was her idea to ride a cab home because her feet hurt;

(14) she saw appellant with the weapon outside the cab and did nothing to stop him;

(15) despite her aching feet, she exited the cab a block from her house and walked home;

(16) she wore the blood-stained jacket which appellant wore in the murders;

(17) she was told by police not to leave the area;

(18) she had no alibi;

(19) she manipulated and controlled appellant; and

(20) she had a motive to avoid involvement because she could be deported if she got into trouble.

Final Brief at 287-89.

At the outset we note that several of appellant's assertions are unsupported by the record. Ms. Pessina was gainfully employed, regularly received money from her father, and denied needing money or asking appellant for money. The testimony of SGT Key, pointed to in appellant's brief in support of his assertion, establishes that appellant was "burning off a lot of money," but makes no references to Ms. Pessina's needs or requests.

63. Appellant's assertion that Ms. Pessina used the proceeds from the robberies to buy cocaine is overstated. She testified that after the 7-Eleven robberies, appellant put some of the money in her jacket pocket, but that she did not use it. The money remained in the jacket pocket until discovered by the police. She testified that she and appellant purchased cocaine on the night after the 7-Eleven robberies. When asked where they obtained the money for the purchase of cocaine, she speculated, "I guess, with the money from the store."

Appellant's assertion that the murder weapon and other evidence were found "littered throughout [Ms. Pessina's] home" is hyperbolic at best. The record reflects that four unspent bullets were found in a dresser drawer along with some clothing; some empty shell casings and one unspent round were found in a trash can in the kitchen; a jacket, ski mask, and gloves were in a closet; and the murder weapon was hidden in a paper bag outside the rear door.

Ms. Pessina's letters to appellant in prison add nothing to appellant's theory. As found by the Court of Military Review, the letters were love letters, nothing more. 34 MJ at 961 n. 6. Ms. Pessina's question whether her letters are inspected reveals nothing more than concern about her intimate letters to appellant being read by prison censors.

Appellant's theory that Ms. Pessina carried the pistol into Mr. Harrison's cab is unsupported by the record. When Mr. Harrison was asked if Ms. Pessina was taking something out of a bag, he prefaced his answer by describing it as "speculation." He then answered that he "heard some *plastic* bag." (Emphasis added.) The murder weapons was found in a paper bag.

64. Appellant's theory that Ms. Pessina manipulated and controlled appellant is likewise unsupported. SGT Key testified that appellant was "overwhelmed with [Ms. Pessina]. He was possessed." On the other hand, she told appellant that he was getting too serious. While it is beyond cavil that appellant was obsessed with Ms. Pessina, there is no evidence that she exploited his obsession to cause the murders and robberies.

With respect to the fact that Ms. Pessina drove the car when appellant robbed the two 7-Eleven stores, the record reflects that appellant did not tell her where he was going. He told her to stop in a place where the first 7-Eleven store was not visible. Both before and after the first robbery she saw him carrying nothing. They then drove to "a street with houses on it" where the 7-Eleven was not in sight. Only after the second 7-Eleven robbery did appellant tell Ms. Pessina what he had done.

With respect to Ms. Pessina's participation in the robbery of Mr. Harrison, the most that the evidence shows is that she knew what was going to happen when she saw appellant's pistol as she exited the cab.

65. In determining whether Ms. Pessina was an accomplice, the test is whether she could have been convicted of any of appellant's crimes. *United States v. McKinnie*, 32 MJ 141, 143 (CMA 1991). If the evidence in this case "raises a reasonable inference that [Ms. Pessina] may have been an accomplice," then the military judge should have allowed the question whether she was an accomplice to have been submitted to the court members with proper instructions upon request. *United States v. Gillette*, 35 MJ 468, 470 (CMA 1992).

We hold that the military judge correctly refused to allow Ms. Pessina to be treated as an accomplice. Even if we construe all the evidence and inferences in the light most favorable to appellant's theory, they fall short of making Ms. Pessina an accomplice. Indeed, in his detailed confession, appellant told SA Schnayerson that Ms. Pessina "didn't have anything to do with it. Nothing at all. She didn't know nothing."

66. There is no evidence that Ms. Pessina knew of the robberies and murders beforehand, that she aided or encouraged them, or that she shared appellant's criminal intent. *See United States v. Knudson*, 14 MJ 13, 15 (CMA 1982) ("The law requires that it be established that there is a concert of purpose or the aiding or encouraging of the commission of the criminal act and a conscious sharing of the criminal intent."). Her knowledge of appellant's robberies and murders after the fact, her failure to stop appellant from robbing Mr. Harrison, her failure to report appellant's crimes after he admitted them to her were insufficient to make her an accomplice. *See* para. 1b(3)(b), Part IV, Manual for Courts-Martial, United States, 1984 ("Mere presence at the scene of a crime does not make one a principal. . . ."); *United States v. Pritchett*, 31 MJ 213, 217 (CMA 1990) ("[M]ere

presence at the scene of a crime committed by another is not sufficient evidence. . . ."); *United States v. Epps*, 25 MJ 319, 321 (CMA 1987) ("failure to stop" a crime is not sufficient). Her less-than-candid initial statements to the police may have made her an accessory after the fact, but no more. *See* Art. 78, UCMJ, 10 USC § 878; para. 3b(4), Part IV.

While Ms. Pessina may have been an accomplice to appellant's offenses involving cocaine, those offenses were not before the court. Appellant's theory was that Ms. Pessina was an accomplice to the murders and robberies. Unlike the accomplice contemplated by the law, Ms. Pessina was not trying to save herself at appellant's expense. To the contrary, all the evidence indicates that she was trying to protect him. Accordingly, we hold that the military judge properly refused to treat Ms. Pessina as an accomplice.

2. Ms. Pessina as a hostile witness

67. Ms. Pessina was called as the first defense witness on the merits. After defense counsel questioned her about her place of birth, family background, education, language abilities, marital status, previous residences, immigration status, and present employment, trial counsel objected to defense counsel's leading questions. The military judge excused the court members and convened an Article 39(a) session. Defense counsel argued that Ms. Pessina was "a key person in the investigation" and that he was "compromised in [his] ability to present evidence" without using leading questions. Upon inquiry by the military judge, defense counsel stated that Ms. Pessina had cooperated in submitting to interviews but had not been responsive to all his questions and that he had not asked her about certain areas which he intended to explore on direct examination. Trial counsel stated that he "would not object to leading questions" if Ms. Pessina demonstrated during her testimony "that she is, in fact, hostile." The military judge then concluded the Article 39(a) session by ruling, "She's not a hostile witness—not now."

Defense counsel then questioned Ms. Pessina on her relationship with appellant, her knowledge of appellant's crimes, her driving the car used in the 7-Eleven robberies, her conversations with appellant after the 7-Eleven robberies, her use of cocaine with appellant, the events leading up to the robbery and attempted murder of Mr. Harrison, the two searches of her residence, and her withholding of information from the police. At that point trial counsel again objected to use of leading questions. Defense counsel again asked permission to use leading questions, arguing that "[s]he is clearly adverse to my client." The military judge responded, "No—absolutely ridiculous. Proceed."

At that point the president of the panel asked the military judge to define an "adverse witness." The military judge explained that counsel were arguing about whether they should be allowed to ask leading questions as an exception to the general prohibition against leading questions on direct examination.

68. After a few more minutes of testimony, the military judge sustained another prosecution objection to leading questions. Defense counsel argued: "The testimony that I seek to elicit from her is that [the police] told her that she was the key witness in the case against Dwight Loving; which makes her—in the defense view—an adverse witness to my client." With the panel members still present, the following exchange then occurred:

> MJ: I told you that was ridiculous, before. How many times have I gotta tell you it's ridiculous? The objection is sustained.
>
> DC: Yes, sir.
>
> MJ: Don't challenge me.
>
> DC: Yes, sir. We will—we would like to submit a written brief, on this, at a later date, if we could, to make sure that we note all the objections we have.
>
> MJ: No.

> DC: No.
>
> MJ: You've entered your objections—
>
> DC: All right—
>
> MJ: —I have listened to your objections—three or four times—I have sustained; and, you're not going to ask any leading questions.
>
> DC: Yes, sir.
>
> MJ: So, please, drive on.
>
> DC: We feel this—
>
> MJ: You open your mouth about it, again, counsel, and I'm going to clear the courtroom and we're going to have a discussion.
>
> DC: Yes, sir.
>
> IDC [Major Hayden]: Your Honor, may we have a side-bar?
>
> MJ: I think we'd better. Gentlemen, why don't you take a break. Court's in recess.

The military judge then convened an Article 39(a) session. Individual defense counsel (Major Hayden) expressed concern about the military judge's characterization of the defense position as "absolutely ridiculous." The military judge offered to give a curative instruction and invited the defense to draft an appropriate instruction. He concluded the session by explaining:

> But, I'll tell you—and, especially you (to defense counsel)—that I'm not going to be challenged. When I tell you a ruling—when I give you a ruling—that's it. I'll be more than happy to reconsider; but, you have to tell me, "Please, Judge, reconsider; based on X, Y, and Z." You just can't keep bringing it up—especially, in

> front of the court members. Now, they asked a question about what an adverse witness is all about. You just can't keep bringing it up, and in my view, try and challenge the bench. That's what I perceived it as . . . but I understand your point; and, I will be more than happy to work with you. Major Hayden, you fashion some language that you think appropriate. . . . Please—if you want to write something out—show it to the prosecutor. Court is in recess.

After a short recess the Article 39(a) session resumed, and defense counsel requested, for the fifth time, that the military judge reconsider his ruling on leading questions. After extensive argument by both sides, the military judge again denied the request.

69. Defense counsel then moved for a mistrial based on the military judge's characterization of the defense argument as "absolutely ridiculous," and objected to any curative instruction at that point in the trial on the ground that they did not "want to 'red flag' that any more than it has occurred, at this time." The military judge denied the request for a mistrial and acceded to the defense request that no on-the-spot curative instruction be given. Thereafter, Ms. Pessina was questioned at length by counsel for both sides, court members, and the military judge, with no further clashes between the military judge and counsel.

Mil.R.Evid. 611(a) directs the military judge to "exercise reasonable control over the mode and order of interrogating witnesses. . . ." Mil.R.Evid. 611(c) permits use of leading questions on direct examination if the witness is "a hostile witness or a witness identified with an adverse party." The question whether to permit "leading questions is discretionary with the military judge." Drafters' Analysis of Mil.R.Evid. 611(c), Manual, *supra* at A22-44 (Change 2.) *See Nutter v. United States*, 412 F.2d 178, 183 (9th Cir.1969) ("The decision to declare a witness hostile . . . is within the court's discretion and will be grounds for

reversal only on showing an abuse of that discretion."), *cert. denied*, 397 U.S. 927, 90 S.Ct. 935, 25 L.Ed.2d 107 (1970).

We hold that the military judge did not become an advocate for the Government or abuse his discretion by refusing to declare Ms. Pessina a hostile witness. It was obvious that she felt great affection for appellant and had attempted to protect him. She answered without resistance or evasion even when questioned about the intimate details of her relationship with appellant, her use of cocaine, her marriage, and her knowledge of appellant's criminal conduct.

J. *The military judge called the defense theory of the case "ridiculous" in the presence of the court members and threatened to deal with defense counsel when he challenged the ruling.*

70. Appellant contends that he was denied a fair trial because the military judge characterized the defense theory as "ridiculous" in the presence of the court members. We hold that appellant was not prejudiced by the military judge's remarks.

It was obvious to the court members, as indicated by the panel president's question, that the controversy was not about the facts of the case or the defense theory, but rather about whether defense counsel should be allowed to ask leading questions on the ground that Ms. Pessina was hostile. Our review of the military judge's remarks, in the context in which they were made, satisfies us that the panel members understood that only defense counsel's assertion that Ms. Pessina was hostile, and not the overall defense theory, was covered by the judge's comment.

We also hold that the military judge did not show bias against appellant. The military judge's remarks clearly were directed at defense counsel's refusal to accept his ruling on leading questions and counsel's continued challenging of the military judge in the presence of the court members. While the remarks may have been intemperate, they were not disqualifying. *See Liteky v.*

United States, __ U.S. at __, 114 S.Ct. at 1157 ("expressions of impatience, dissatisfaction, annoyance, and even anger" not sufficient to establish "bias or partiality"; "even a stern and short-tempered judge's ordinary efforts at courtroom administration" do not establish bias or partiality.)

K. *The military judge displayed his dislike for defense counsel throughout the trial by making critical comments.*

Virtually all of the comments complained of have been discussed with respect to Issue IV, subissue E(1), *supra* 14 M.J. at (82) and Issue IV, subissues F and G, *supra* 27 M.J. at (90) and (91). In addition, appellant asserts that the military judge implied "that defense counsel was a liar for suggesting that Mr. Sharbino" lost consciousness "instantly after being shot." Final Brief at 145.

71. This assertion is unsupported by the record. The discussion referenced by appellant occurred just prior to sentencing arguments and pertained to items proposed by the defense to be listed by the military judge as mitigating factors. After individual defense counsel requested a ruling on the proposed mitigating factors prior to making his argument, the military judge said, "Well, I have some difficulty with number eighteen," which recited that "[t]he murder victims experienced minimal pain and suffering." Defense counsel argued that the forensic pathologist had testified that "any kind of major brain trauma . . . would have resulted in immediate loss of consciousness." After trial counsel argued that "[w]e don't know what these people went through," the military judge agreed with trial counsel, but told defense counsel, "Now, you can certainly argue whatever you want to argue in that regard to the court members, but I'm not going to list that as a mitigating factor." In our view, the military judge's ruling and comment fall far short of implying that defense counsel was lying.

ISSUE V

WHETHER APPELLANT WAS DENIED A FAIR TRIAL DUE TO NUMEROUS ACTS OF PROSECUTORIAL AND LAW ENFORCEMENT MISCONDUCT, WHICH INCLUDE HIDING EXCULPATORY EVIDENCE, DESTROYING POLICE NOTES CONCERNING 16 MINUTES OF APPELLANT'S CONFESSION, LYING ABOUT MS. PESSINA'S INVOLVEMENT IN THE CRIMES TO THE JUDGE AND PANEL, AND USE OF A SURPRISE WITNESS WITHOUT REASONABLE NOTICE AND WITHOUT PROVIDING APPROPRIATE DISCOVERY.

72. Appellant asserts that exculpatory evidence, in the form of tests of his blood for alcohol and drug abuse, were illegally hidden from the defense. His assertion is unsupported by the evidence. Although blood, saliva, and hair samples were taken from him, they were not tested for alcohol or drugs because neither side requested such tests. The evidence which appellant asserts was hidden from him did not exist. Govt.App. Ex. 6, ¶ 4.

Appellant asserts that SA Schnayerson's interview notes for a 16-minute period preceding appellant's confession were concealed from him. He claims that the last entry in SA Schnayerson's notes was made at 7:56 p.m. and Investigator Wedge's investigative report reflects that appellant confessed at 8:12 p.m. Based on this evidence he speculates that there must have been additional entries which were concealed because they reflected coercive interview tactics. Final Brief at 171-72. In a post-trial affidavit SA Schnayerson asserts that there are no missing notes. Also, Government Appellate Exhibit 7 (Vol. VII, Appellate Papers) includes a page of SA Schnayerson's notes with entries at 7:58 and 8:05 and noting the confession at 8:12. Furthermore, Investigator Wedge's report reflects that at approximately 8:00

p.m. he was advised that the murder weapon was found at Ms. Pessina's residence, and he interrupted SA Schnayerson to inform him of the results of the search in appellant's presence. This Court is unwilling to assume sinister motives based on this evidence, especially when the defense chose not to litigate the voluntariness of appellant's confession at trial.

73. Appellant also asserts that Investigator Wedge's handwritten notes, made while observing the interrogation of appellant by SA Schnayerson, "have vanished without a trace." Final Brief at 170. This assertion is unsupported by the record. Investigator Wedge's investigative report recites that his interview notes were dictated onto microtape and transcribed. He also recited that his handwritten notes were marked as evidence and secured. At an Article 39(a) session on March 17, 1989, trial counsel represented that he had provided the defense with a "four-inch-thick packet" from the Killeen Police Department, as well as reports from the FBI and the Texas Rangers. Trial counsel recited, "I just don't know of anything, out there, possibly, that they couldn't have." The military judge specifically asked about investigator's notes, and trial counsel responded:

> It had everything. Yes, it had the notes—written—and, typed reports. . . . If there is something else, out there—if the defense is made aware—or, if something comes up—I'll be happy to issue a subpoena.

At no time during subsequent Article 39(a) sessions or during the trial on the merits did the defense complain about the absence of Investigator Wedge's handwritten interview notes, even though they were specifically mentioned in his typed report of investigation. During Investigator Wedge's testimony on the merits, defense counsel did not cross-examine him about the allegedly missing notes. Based on the record before us, we will not presume noncompliance with the discovery request or that the notes were hidden or destroyed.

Appellant's assertion that the prosecution concealed evidence of Ms. Pessina's involvement in the crimes is unsupported by the record. Ms. Pessina's personal life, marital status, relationship with appellant, drug use, and involvement in the crimes were fully explored on the record. There is not one iota of evidence that the prosecution withheld information from the defense about Ms. Pessina.

Appellant's assertions concerning Private Brown's testimony as a "surprise witness" are without merit for the reasons set out in our disposition of Issue IV, subissue H, *supra* at 259.

ISSUE IV

WHETHER MILITARY DUE PROCESS AND ARTICLES 66 AND 67, UCMJ, 10 USC §§ 866, 867 REQUIRE THIS COURT AND THE COURTS OF MILITARY REVIEW TO REVIEW ALL CAPITAL CASES *IN FAVOREM VITAE* SINCE CAPITAL LITIGATION IS IN ITS INFANCY IN THE MILITARY JUSTICE SYSTEM AND TRIAL AND APPELLATE DEFENSE COUNSEL LACK THE TRAINING AND EXPERIENCE NECESSARY TO PRESERVE THE RECORD ON ALL ISSUES AND PREVENT APPLICATION OF WAIVER.

74. Appellant requests this Court to refrain from applying "waiver to any issues not technically preserved by trial defense counsel"; specify any meritorious issues not raised by appellate defense counsel; and "order that a death sentence may not be affirmed unless the Courts of Military Review and this Court are satisfied beyond a reasonable doubt that the findings and sentence are proper." Final Brief at 197.

As conceded by appellant, this *in favorem vitae* ("in favor of life") approach to appellate review of capital cases has been rejected by the Supreme Court. *See Smith v. Murray*, 477 U.S.

527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). To the extent that appellant asks us to suspend the waiver provisions of Mil.R.Evid. 103 and the scope of appellate review under Articles 66 and 67, UCMJ, 10 USC §§ 866 and 867 (1989), respectively, we decline to do so. Those powers are reserved to Congress and the President.

Furthermore, we are not persuaded that such a broad scope of *de novo* review is warranted. While the military counsel in this case had limited experience in capital cases, most of the issues in this case dealing with pretrial discovery, *voir dire*, selection of court members, admissibility of evidence, and the like are not peculiar to captial cases. The broad power of plenary review exercised by Courts of Military Review, as well as this Court's authority to specify issues; order a hearing under *United States v. DuBay*, 17 USCMA 147, 37 CMR 411 (1967); apply the "plain error" doctrine; and find counsel ineffective for egregious errors, provide ample protection for the accused in this case.

ISSUES VII AND VIII

WHETHER THE GOVERMENT'S FAILURE TO GIVE NOTICE OF THE AGGRAVATING CIRCUMSTANCES THEY INTENDED TO PROVE, OTHER THAN THOSE SPECIFICALLY LISTED IN RCM 1004, VIOLATED THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, AND ARTICLE 55, UCMJ.

WHETHER THE MILITARY JUDGE ERRED IN INSTRUCTING APPELLANT'S SENTENCING PANEL THAT THEY COULD CONSIDER AGGRAVATING CIRCUMSTANCES OF WHICH THE DEFENSE HAD BEEN GIVEN NO NOTICE PRIOR TO TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, AND ARTICLE 55, UCMJ.

75. Appellant contends that because the prosecution failed to give pretrial notice of evidence in aggravation, "[t]he unforeseen ambush of additional aggravating factors had an overwhelming prejudicial effect." Final Brief at 205. We hold that appellant's constitutional rights under the Fifth, Sixth, and Eighth Amendments as well as his rights under Article 55, UCMJ. 10 USC § 855, were not violated.

Surprises should be avoided in capital sentencing. *See Smith v. Estelle*, 602 F.2d 694, 699-703, *aff'd*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). In a capital case, RCM 1004(b)(1) requires the prosecution to give the defense written notice of the "aggravating factors" set out in (c) that it intends to prove. RCM 1004(b) specifically provides that the capital sentencing procedures are in addition to those in RCM 1001. RCM 1001(b)(4) allows the prosecution to present evidence in aggravation. Although RCM 1001(b)(4) has no specific notice requirement, RCM 701(a)(5) requires disclosure of sentencing evidence upon request of the defense. Compliance with these rules will eliminate surprises during the sentencing hearing.

Prior to appellant's trial the prosecution complied with RCM 1004(b)(1) by serving the defense with written notice of the Government's intent to prove six aggravating factors. Appellant does not contest the prosecution's compliance with RCM 1004(b)(1), but asserts that he was "ambush[ed]" by proof of the following aggravating circumstances (Final Brief at 205) not included in the prosecution's written notice; (1) appellant's records of nonjudicial punishment; (2) Captain Bush's testimony regarding appellant's lack of rehabilitative potential; (3) "the nature of the weapon used" in "the offenses and the fact that" appellant "fired the weapon during the course of each offense";

(4) the fact that appellant "killed his victims after they had fully cooperated"; (5) "the nature and extent of the injuries suffered by the victims"; (6) appellant's "lack of any remorse"; and (7) appellant's statements to PVT Brown "that the first killing was to see if he could get away with it and, after that, it was for fun." Final Brief at 203.

76. The record does not support appellant's claim of a trial by ambush. Prior to trial, defense counsel requested disclosure of sentencing evidence. When compliance with discovery requests was discussed at an Article 39(a) session prior to the trial on the merits, defense counsel made no complaint. At an Article 39(a) session prior to the sentencing hearing, trial counsel listed the evidence he intended to introduce, which included appellant's service records, his records of nonjudicial punishment, and CPT Bush's testimony. Although defense lodged several objections, none were based on lack of pretrial disclosure.

With respect to the testimony of Private Brown, we resolved the issue of adequate notice against asppellant in our disposition of Issue IV, subissue H, *supra* 41 MJ at 259. On the basis of the record before us, we hold that appellant's claim of inadequate notice is not supported by the evidence.

ISSUE IX

WHETHER APPELLANT'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, IN THAT APPELLANT WAS GIVEN THE DEATH PENALTY BASED UPON A CONGLOMERATION OF AGGRAVATING FACTORS WHICH INEXTRICABLY DOUBLE COUNTED APPELLANT'S CRIMES

77. Appellant's court-martial unanimously found, beyond a reasonable doubt, that the following aggravating factors had been

proven: (1) "The premeditated murder of Bobby Gene Sharbino was committed while" appellant "was engaged in the commission or attempted commission of a robbery" (RCM 1004(c)(7)(B)); (2) appellant "was the actual perpetrator of the killing" in the felony murder of Christopher Fay (RCM 1004(c)(8)); and (3) "[h]aving been found guilty of premeditated murder of Bobby Gene Sharbino," appellant was also convicted "of another violation of Article 118, UCMJ, in the same case" (RCM 1004(c)(7)(J)). These findings as to aggravating factors were consistent with the court-martial's unanimous findings of guilty as to the premeditated murder of Bobby Gene Sharbino (specification 2 of Charge I); the felony murder of Bobby Gene Sharbino (specification 4 of Charge I), which was later dismissed as multiplicious; and the felony murder of Christopher Fay (specification 3 of Charge I).

Appellant contends that there was a double counting of aggravating factors, since the same two murders constituting the first two aggravating factors were used to constitute the third. *See United States v. Curtis* (Curtis I), 32 MJ 252, 269 (CMA), *cert. denied*, __ U.S. __, 112 S.Ct. 406, 116 L.Ed.2d 354 (1991). He argues that the double counting was prejudicial because the court members sentenced him to death based on three aggravating factors, when there were only two. As we noted in our second consideration of *United States v. Curtis* (Curtis II), 33 MJ 101, 108 (CMA 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 1177, 117 L.Ed.2d 421 (1992), "we doubt that the President intended for commission of a double murder to constitute two 'aggravating factors,' rather than only one."

In *Curtis II*, we remanded the case to the Court of Military Review to determine "[w]hether the number of 'aggravating factors' in th[at] case had any effect on the sentence." 33 MJ at 108. We need not remand appellant's case, however, because the Court of Military Review has already found, and we agree, "that the number of aggravating factors" did not affect the deci-

sion of the court-martial "to impose the death sentence." 34 MJ at 969.

78. Furthermore, unlike *Curtis II*, there was no double counting in appellant's case. In *Curtis II*, the following aggravating factors were found:

> 1) "the premeditated murder of" Mrs. Lotz "was committed while [Curtis] was engaged in the commission of a burglary";
>
> 2) "with regard to the premeditated murder of" Mrs. Lotz, Curtis had "been found guilty in the same case of another murder"—that of Lieutenant Lotz; and 3) "with regard to the premeditated murder of" Lieutenant Lotz, Curtis had "been found guilty in the same case of another murder"—that of Mrs. Lotz.

33 MJ at 108, *quoting* 32 MJ at 269 (*Curtis I*).

Appellant's case is distinguishable from *Curtis II*. In appellant's case the premeditated murder of Bobby Gene Sharbino was aggravated by two factors: (1) the murder was committed while appellant was engaged in the commission of a robbery, and (2) appellant was found guilty of another Article 118 violation (the felony murder of Christopher Fay) in the same case. RCM 1004(c)(7)(B). The felony murder of Christopher Fay was aggravated by one factor, that the accused was the actual perpetrator of the killing. RCM 1004(c)(8). The two aggravating factors applicable to the murder of Bobby Gene Sharbino are distinct from the aggravating factor applicable to the felony murder of Christopher Fay. Unlike *Curtis II*, the two murders were not used to aggravate each other. Although the felony murder of Christopher Fay was used to aggravate the premeditated murder of Bobby Gene Sharbino, the premeditated murder of Bobby Gene Sharbino was not used to aggravate the felony murder of Christopher Fay. Accordingly, we hold that there was no double counting of aggravating factors in appellant's case.

ISSUE X

WHETHER APPELLANT'S DEATH SENTENCE IS INVALID UNDER THE FIFTH AND EIGHTH AMENDMENTS TO THE CONSTITUTION AND ARTICLE 55, UCMJ, BECAUSE THE SENTENCING PANEL WAS IMPROPERLY PERMITTED TO CONSIDER "LACK OF REHABILITATIVE POTENTIAL." "PRESERVATION OF GOOD ORDER AND DISCIPLINE," AND "SPECIFIC DETERRENCE" IN SENTENCING DELIBERATIONS.

79. As previously noted in our disposition of Issue III, subissue F, *supra* at 246, appellant's records of nonjudicial punishment were admissible under RCM 1001(b)(2), and CPT Bush's testimony regarding appellant's previous performance of duty was admissible under RCM 1001(b)(5), but the military judge erred by characterizing that evidence as aggravating circumstances.

The question remains whether it was error for the military judge to permit the court-martial to consider "lack of rehabilitative potential" at all in a capital case. Appellant argues that rehabilitative potential was not in issue in this case, since life imprisonment was the mandatory minimum and a punitive discharge is included in a death sentence and is "virtually a foregone conclusion" even if death was not imposed. Final Brief at 217. *See* RCM 1004(e) ("A sentence of death includes a dishonorable discharge. . . ."). To the extent that CPT Bush's testimony was a prohibited euphemism for a punitive discharge (*see United States v. Ohrt*, 28 MJ 301, 305 (CMA 1989)), any error in its admission was waived and does not rise to the level of plain error. Mil.R.Evid. 103(a) and (d).

Nevertheless, appellant's past performance was not irrelevant. The defense case on the merits had included the testimony of SGT Key regarding appellant's erratic duty performance. *See*

Issue III, subissue F, *supra*. In addition, the defense submitted appellant's "good duty performance under the guidance of strong leadership" as a mitigating factor on sentencing. CPT Bush's testimony was relevant to determining whether appellant's performance under SGT Key's leadership merited consideration as a mitigating factor.

Appellant also contends that the military judge erred by instructing the members as follows:

> In the military, we recognize five principal reasons for sentencing those who violate the law . . . [T]hose principles are the following:
>
> Number one, protection of society from the wrongdoer;
>
> Number two, the punishment of the wrongdoer;
>
> Number three, the rehabilitation of the wrongdoer;
>
> Number four, the preservation of good order and discipline in the military; and
>
> Number five, the deterrence of the wrongdoer and those who know of his crime and his sentence from committing the same or similar type offenses.

80. Appellant now argues that the instruction "injected arbitrary and improper considersations into the sentencing deliberations." Final Brief at 218. He argues that only punishment and deterrence are relevant in a capital case. Final Brief at 211.

We hold that any issue as to the propriety of the military judge's instructions on sentencing principles was waived. Defense counsel objected only to mention of specific deterrence. Defense counsel specifically requested that a similar instruction be given during *voir dire* (R. 380-81), and did not object or propose additional instructions when it was given to deliberations on sentence. RCM 1005(f).

The context in which the instruction was given minimized any opportunity for misunderstanding. It was phrased in terms of general principles applicable to all cases involving "those who violate the law," not just appellant's case. The instruction followed very detailed instructions for voting on the aggravating factors relied on by the prosecution to qualify appellant for the death penalty, considering the other aggravating circumstances, weighing the aggravating factors and circumstances against the mitigating factors, and then determining whether to impose a sentence of death or life imprisonment. In context, the instruction merely presented a general philosophical background for the very specific and detailed instructions which had preceded it.

Finally, we disagree with appellant's assertion that protection of society and preservation of good order and discipline were not permissible consideration in this case. Protection of society was a consideration in this case, but the means available to the court-martial were limited in view of the mandatory minimum punishment. Defense counsel used this principle of sentencing to advantage by arguing that the needs of society for protection could be satisfied by life imprisonment, and they presented evidence that appellant adapted well to prison life and would not present a continuing danger in that controlled environment. Preservation of good order and discipline may have been redundant with deterrence in this case, but nevertheless was a relevant principle.

ISSUE XI

WHETHER APPELLANT'S DEATH SENTNECE VIOLATES THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, IN THAT APPELLANT WAS DENIED A FAIR SENTENCING HEARING.

This issue involves four sub-issues that will be analyzed individually.

A. *Whether the military judge erroneously admitted into evidence punishments and vacations of suspensions of punishments under Article 15, UCMJ, and erroneously failed to limit the panel's consideration of this evidence, by instruction, to the character of appellant's prior service.*

We resolved this issue against appellant in connection with Issue III, subissue F, *supra* at 246.

B. *Whether the military judge erred in failing, sua sponte, to restrict the improper "rebuttal" testimonies of Ranger Aycock and Private Brown to the proper scope of rebuttal.*

We resolved this issue against appellant in conncetion with Issue III, subissue I, *supra* at 250, and Issue IV, subissue H, *supra* at 259.

C. *Whether trial counsel improperly bolstered the credibility of Ms. Pessina by declaring that her testimony was not immunized and she could not be charged with a criminal offense in conncection with this case.*

81. Appellant asserts that trial counsel improperly bolstered the credibility of Ms. Pessina by injecting information outside the record about her lack of immunity, eliciting testimony from Ranger Aycock that she could not be charged with joint possession of the marijuana found in her residence, and improperly arguing that she was not criminally involved in the offenses.

After her testimony on the merits, Ms. Pessina was asked by a court member, "Do you have any kind of immunity, to testify here at this court-martial?" She responded, "I no understand

'immunity' " Trial counsel interjected, "Your Honor, I'll make an offer of proof that no immunity has been offered, nor has any immunity been granted to this witness." Following further discussion and explanation, Ms. Pessina testified that no one had promised her anything for her testimony, except, "if I lie, I gonna go to jail." On redirect examination, defense counsel again raised the subject of immunity, to which Ms. Pessina replied, "They just say, if I lie, something gonna happen to me."

During trial counsel's argument on findings, he argued that appellant committed his crimes alone and "there was nobody else with him." He concluded by arguing, "If there is evidence of conspiracy or accomplice, then somebody better come forth and provide that to the Bell County District Attorney, because there is not enough yet to say that Nadia Pessina was involved in these crimes."

During the sentencing hearing, Ranger Aycock testified that a small quantity of marijuana was found in Ms. Pessina's residence, which she shared with Ms. Ira Printers and sometimes with appellant. Trial counsel asked, "[I]sn't it true that . . . there were no fingerprints found on the marijuana taken out of 909 Mimosa?" Ranger Aycock responded, "Major, there wasn't enough marijuana there to roll a good cigarette. . . . I don't know how you guys work it in the military . . . but in the State of Texas you've got to prove possession of a drug on someone. Joint possession is not going to get it. Your've got to put it on somebody and prove that it's theirs. . . ." Trial counsel remarked, "Ranger, that's true in the military too." When defense counsel objected, trial counsel withdrew his remark.

82. On the basis of the record before us, we hold that there was no improper bolstering of Ms. Pessina's testimony. This case is virtually the opposite of *United States v. Simtob*, 901 F.2d 799 (9th Cir. 1990), cited by appellant. Trial counsel was not attempting to bolster his own witness, because Ms. Pessina was a defense witness. The subject of immunity was introduced by a court

member and further developed by defense counsel on redirect examination. There was nothing to bolster because the absence of immunity was uncontroverted.

With respect to trial counsel's argument on findings, we hold that it was within the range of fair comment on the evidence. *See United States v. White*, 23 MJ 84, 88 (CMA 1986). Lastly, with respect to Ranger Aycock's testimony, we think it abundantly clear that Ranger Aycock was not vouching for Ms. Pessina's innocence, but only opining that he didn't have enough evidence to prove that she owned the marijuana.

D. *Whether trial counsel improperly bolstered the credibility of Private Brown by declaring that he was not immunized, had not asked for any favors, and was testifying only because he was ordered to do so.*

83. One final argument raised by appellant is that the testimony of Private Brown was improperly bolstered when trial counsel, during closing argument, stated that Private Brown never received any incentives for his testimony and appeared to testify truthfully based on his demeanor. Trial counsel's comment was based on Private Brown's response to a question from a court member who asked if he had been promised anything in return for his testimony. Private Brown responded that he did not want to testify but had been "ordered to," but that no one had promised him anything, including a reduction in his prison sentence, for his testimony.

Appellant's assertion that trial counsel insinuated facts outside the record is undermined by the record itself. Private Brown unequivocally testified, without contradiction, that he was promised nothing for his testimony. Furthermore, trial counsel's contention that PVT Brown's demeanor indicated his truthfulness was simply fair comment on the evidence. *See Dyer v. McDonnall*, 201 F.2d 265, 268-69 (2d Cir.1952) (demeanor of witness is evidence). We hold that trial counsel did not improperly bolster the credibility of Private Brown.

ISSUE XII

WHETHER PRIVATE FORREST BROWN, A GOVERNMENT WITNESS AT SENTENCING, IMPEACHED THE VERDICT OF GUILTY OF THE FELONY-MURDER VERDICT OF FAY WHEN HE TOLD THE PANEL THAT APPELLANT EXPRESSLY DID NOT KILL IN FURTHERANCE OF THE ROBBERY (TO EFFECTUATE APPELLANT'S ESCAPE AS ARGUED BY THE GOVERNMENT ON THE MERITS), BUT INSTEAD KILLED FAY FOR FUN, MERELY "TO SEE IF HE COULD DO IT."

84. During the sentencing hearing, PVT Brown testified that appellant told him that his reasons for "the shootings" were "to see if he could get away with it, and then he did it because it was fun." Appellant now argues that PVT Brown's testimony improperly impeached the verdict, because it contradicted trial counsel's argument on findings that appellant "at the time of the killing . . . was participating in the commission of a robbery, . . . [a]nd by killing them he prevents an identification of him with the robbery." Final Brief at 239. He asserts that the military judge should have *sua sponte* intervened and either set aside the conviction of felony-murder with respect to Christopher Fay or ordered Private Brown's testimony stricken.

We disagree with appellant's interpretation of the testimony. PVT Brown did not specify which "shootings" appellant was talking about, although PVT Brown referred to the 7-Eleven robberies as well as the robberies and murders of the cab drivers. More importantly, we reject appellant's theory that killing for fun and killing to prevent identification are mutually exclusive. We hold that the military judge had no legal duty to intervene.

ISSUE XIII

WHETHER THE MILITARY JUDGE ERRONEOUSLY DENIED APPELLANT'S MULTIPLICITY MOTION TO DISMISS THE UNANIMOUS FELONY-MURDER VERDICT, IN LIEU OF THE NONUNANIMOUS PREMEDITATED MURDER VERDICT.

85. Appellant was charged with both premeditated murder and felony murder with respect to both PVT Fay and Mr. Sharbino. Prior to arraignment appellant moved to dismiss the felony-murder specifications (specifications 3 and 4 of Charge I) as multiplicious. The military judge ruled "that it would be premature" to dismiss any specifications at that time, without hearing all the evidence. After findings, the defense renewed their motion to dismiss the felony-murder specifications. The prosecution requested that the nonunanimous conviction of the premeditated murder of Christopher Fay (specification 1 of Charge I) be dismissed so that the court-martial would have the option of considering the unanimous conviction of the felony murder of Christopher Fay (specification 3 of Charge I) as an aggravating factor. The military judge granted the prosecution's request.

Appellant now argues that the military judge erred by refusing to dismiss the felony murder specification. We hold that the military judge did not err. Even before our decision in *United States v. Teters*, 37 MJ 370 (CMA 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 919, 127 L.Ed.2d 213 (1994), we held that "if the same homicide is the subject of findings of premeditated murder and felonly murder, *one* should be set aside." *United States v. Hubbard*, 28 MJ 27, 34 (CMA 1989) (emphasis added), *cert. denied*, 493 U.S. 847, 110 S.Ct. 142, 107 L.Ed.2d 101 (1989). *See Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). We need not decide whether this requirement was affected by *Teters*, since the military judge eliminated

any possibility of multiplicity for findings by granting the prosecution's motion to dismiss. The military judge's decision to dismiss those findings left only the unanimous findings. By eliminating those findings about which one or more court members had a reasonable doubt, the military judge increased the reliability of the factors to be considered on sentencing. His ruling was well within the limits of his discretion.

ISSUE XIV

WHETHER THE MILITARY JUDGE DENIED APPELLANT A FAIR SENTENCING PROCEEDING UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, AND ARTICLE 55, UCMJ, WHEN HE LIMITED APPELLANT'S ABILITY TO PRESENT RELEVANT EXTENUATION AND MITIGATION EVIDENCE AND ARGUMENT TO THE MEMBERS.

86. Appellant asserts that he was denied a fair sentencing proceeding because of the military judge's rulings on four specific issues, which we will not analyze separately.

A. *Whether the military judge erroneously ruled that Ms. Fisher's testimony was based upon hearsay and was not relevant to the proceedings.*

After being called as a defense witness, Ms. Pessina denied needing money or asking appellant for money. She testified that she was employed and regularly received between $200.00 and $250.00 per month from her father.

Appellant presented rebuttal from SGT Key, who testified that Ms. Pessina smoked hashish in his presence, offered him "a drag," shared the hashish with another person who was present, told SGT Key that she sold drugs and showed him bags of drugs and money, and showed SGT Key where she hid her drugs and money.

Defense counsel requested that Ms. Ana Fisher be called as a witness in further rebuttal of Ms. Pessina's testimony. Ms. Fisher's sworn statement was proffered as evidence of her expected testimony. In her statement Ms. Fisher's stated that she had "heard rumors" in the Noncommissioned Officers Club bar that Ms. Pessina was indebted to drug dealers and that appellant was trying to help her obtain money. When asked by SA Schnayerson, the CID interrogator, if she wished to add anything to her statement, Ms. Fisher said:

> I'm not for sure, what I heard, when I heard that LOVING could get death, I thought I might can help out about some rumors I heard, I don't know if there [sic] true or not, and because about the TV and remembering things, I could be wrong about what I heard, I don't want to testify to this, because I'm not sure, I didn't think it would be a big thing, I just thought I would come up and tell someone and that would be it, but I can't testify on something I'm not sure about.

After trial counsel objected that Ms. Fisher's testimony would be "hearsay . . . on rumor," the military judge stated:

> I realize that the rules are relaxed and should be for a capital case, but that doesn't mean that the rules are completely thrown out. Ms. Fisher, from what I read in Appellate Exhibit CXLI . . . has nothing at all to offer to this case. . . . Absolutely nothing, unless you want to bring her on to tell us that she knows Private Loving and that sometime apparently last year that he was looking for money. . . . if there was something, anything, concrete here, I would allow it, but this is no good at all.

After further argument the military judge asked if the defense wanted to call Ms. Fisher "to tell the court members anything

about her involvement with Private Loving?" At that point defense counsel announced, "We don't . . . need her testimony, so we would rest."

87. Appellant now argues that Ms. Fisher's proferred testimony would have been "very probative and extremely relevant." Final Brief at 247. He cites *Green v. Georgia,* 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979), in support of his argument.

We agree with government appellate counsel that *Green* is inapposite. That case involved testimony of a witness who heard the defendant's co-actor admit that he, and not the defendant, was the triggerman in a murder and rape. After the proferred testimony was excluded, the prosecutor argued that the defendant was the triggerman. The Supreme Court noted that the excluded testimony "was highly relevant . . . and substantial reasons existed to assume its reliability." 442 U.S. at 97, 99 S.Ct. at 2151. The uncertain barroom rumor offered by the defense in appellant's case is a far cry from the testimony of an eyewitness to a co-actor's confession in *Green.*

Even in a capital sentencing hearing, the military judge has discretion to exclude evidence having little probative value if its admission would be a waste of time and the evidence is cumulative. Mil.R.Evid. 403. In this case the probative value of Ms. Fisher's testimony was nil and would have been cumulative. We hold that the military judge did not abuse his discretion.

> B. *Whether the military judge erroneously refused to permit trial defense counsel to argue that the victim was rendered unconscious immediately and did not suffer as a result of his wound.*

88. This subissue misstates the record. The military judge refused to list Mr. Sharbino's lack of pain and suffering as a mitigating factor, but he expressly told defense counsel, "[Y]ou can certainly argue whatever you want to argue in that regard to the court members, but I'm not going to list that as a mitigating factor."

C. *Whether the military judge erroneously refused to allow testimony concerning appellant's susceptibility to manipulation by people he cared about.*

This subissue again misrepresents the record. The military judge excluded no evidence concerning appellant's susceptibility to manipulation. The portions of the record referenced in appellant's brief (at 249-50) pertain to a discussion of the military judge's instructions to the court members regarding mitigating factors. After some discussion about the evidence of manipulation, counsel for both sides agreed to the wording of the military judge's instruction, which told the court members that they could consider, as a factor in mitigation, that "during his early youth, the accused was a follower." We hold that the military judge did not err.

D. *Whether the military judge erroneously added a disclaimer to appellant's mitigating evidence concerning drug involvement.*

Appellant takes issue with the military judge's use of the words, "if any," after the ninth mitigating factor: "Drug involvement in any of these offenses that was demonstrated through the evidence, if any." We agree with government appellate counsel that the term "if any" is not a disclaimer but merely places the factfinding authority with the court members, where it belongs. Furthermore, since defense counsel did not object to the phrase, the issue was waived. RCM 1005(f).

ISSUE XV

WHETHER THE MILITARY JUDGE ERRED IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, IN HIS FAILURE TO INSTRUCT THE PANEL MEMBERS THAT THE ONLY OFFENSES

FOR WHICH APPELLANT COULD BE SENTENCED TO DIE WERE FELONY MURDER AND PREMEDITATED MURDER AND THAT APPELLANT COULD NOT BE SENTENCED TO DIE ON THE BASIS OF THE CUMULATION OF ALL THE OFFENSES.

We resolve this issue against appellant for the reasons stated in our resolution of Issue III, subissue J., *supra* 41 MJ at 251.

ISSUE XVII

WHETHER THE MILITARY JUDGE IMPROPERLY MARSHALED THE EVIDENCE IN FAVOR OF THE GOVERNMENT WHEN HE SUMMARIZED THE GOVERNMENT WITNESSES' AGGRAVATION TESTIMONY, BUT DECLINED TO SUMMARIZE THE WITNESS TESTIMONY PRESENTED BY THE DEFENSE IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, AND ARTICLE 55, UCMJ.

90. Appellant asserts that the military judge unfairly "summarize[d] the bulk of the testimony of government witnesses in aggravation, but declined to summarize the defense evidence in like fashion." Final Brief at 259-60. Appellant specifically points to the treatment of the testimony of CPT Bush and PVT Brown in support of his assertion.

With respect to the testimony of CPT Bush, the military judge read from the list of aggravating factors submitted by the prosecution and discussed them during an Article 39(a) session. Defense counsel did not object to the description of CPT Bush's testimony. The military judge listed seven aggravating circumstances, including "the testimony of Captain Bush that the accused is of average intelligence and has been counseled on occasions in an effort to make him a satisfactory duty performer and, in his opinion, has no rehabilitative potential."

Regarding the testimony of PVT Brown, listed as the last of seven aggravating circumstances proposed by the prosecution, the military judge instructed the members as follows:

> Now, I'm going to leave it to you, the court members, to sift through all the evidence in this case and make determinations on those particular issues. I'm not going to try to pick out pieces of evidence and stick a label on it, whether it was remorse or lack of remorse. That's for you to decide. Those are the issues that you have to decide in this particular case.
>
> But the seventh aggravating circumstance is the testimony of Private Brown that the accused told Private Brown that the first killing was to see if he could get away with it and, after that, it was for fun.

Apart from the list of 17 mitigating circumstances and 7 aggravating circumstances proposed by counsel, the military judge merely listed the witnesses by name and documents by exhibit number. With respect to evidence of aggravating circumstances, he instructed:

> The United States, incidentally, presented some evidence during the sentencing phase of the trial and I'll get into that in just a few moments. Well, why don't I tell you now that they presented to you Captain Bush, obviously, I mentioned that just a few moments ago; Sergeant Uitenham, and Sergeant Kammon. They also presented certain documents during this presentencing phase of the trial. You may recall those were Prosecution Exhibits 96, 97, 99, 101, and 102. . . .

91. With respect to defense evidence, the military judge read from the list of mitigating circumstances submitted by defense counsel, mentioned the duration of appellant's pretrial confinement, his awards and decorations, and Defense Exhibits A through

Y. Lastly, he called the court members' attention to "the witnesses that were presented by the defense during . . . the sentencing phase of the trial." With respect to these witnesses, he instructed as follows:

> I won't try to summarize the testimony of these witnesses, I'll leave it to you to recall that testimony. Remember, though, what I said, though, about problems in recalling any testimony of a witness, you can play it back—or I'll have it played back for you if you desire. But anyway, the witnesses during the pre-sentencing phase of the trial: Lucille Williams; Ronald Loving; Gwendolyn Black; Harold Loving, and that was presented through a stipulation of expected testimony; Joe Loving, Sr.; Jimmy Verna; Kenneth Wilson, also through a stipulation of expected testimony; you heard from Sergeant Key, actually, you heard from Sergeant Key during the findings phase of the trial as well as in the sentencing phase of the trial, actually you heard it three times, you heard Sergeant Key three times; you also heard Sergeant Sanchez and Sergeant Mercardo, both IDF guards; Mr. Johnson about the accused's boxing experiences, amongst other things; and you also heard from Specialist Hall, another soldier assigned to the IDF. . . .

After explaining in detail how to use the sentence worksheet, the military judge concluded his instructions by telling the court members, "I want to make it clear, as I made clear, I hope, with the Findings Worksheet, that that shouldn't be somehow interpreted as an expression or opinion on my part, nor, for that matter, on counsel's part, as to what an appropriate sentence should be. That's your job and no one else's in this case." At the end of his instructions, the military judge asked, "Does counsel for either side have any objections to the instructions or requests not previously voiced?" Both sides responded in the negative.

We hold that the military judge did not err. After reviewing his instructions as a whole, we are satisfied that he carefully walked "the tightrope over which a trial judge must tread." *United States v. Shackelford*, 2 MJ 17, 19 (CMA 1976).

ISSUE XVIII

WHETHER THE MILITARY JUDGE ERRED IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, IN FAILING TO INSTRUCT THE PANEL IN THE PRESENTENCING HEARING TO DISREGARD ANY COMMENTS, STATEMENTS, OR GESTURES MADE BY THE MILITARY JUDGE WHICH MIGHT INDICATE AN OPINION ON HIS PART THAT APPELLANT SHOULD BE SENTENCED TO DEATH.

92. We hold that the military judge adequately instructed the court members against interpreting the military judge's words or actions as an expression of opinion regarding the sentence. As we noted in our analysis of Issue IV, subissue I, *supra* at 263, the military judge offered to give an on-the-spot curative instruction after the clash with defense counsel over the question whether Ms. Pessina was a hostile witness. Defense counsel objected to a curative instruction on the ground that it would "red flag" the issue. The military judge instructed the members as follows after presentation of the prosecution and defense cases in the merits:

> You must disregard any comments, any statements, any gestures that I may have made throughout the course of this trial that would seem to indicate an opinion on my part as to the guilt or innocence of this accused. That is your job and no one else's job. It would be not only unlawful, but it's certainly inappropriate for a military judge to attempt to influence you in any way regarding those ultimate—or that ultimate issue, guilt or innocence. . . .

After explaining the findings worksheet in detail, the military judge again cautioned the members that "this worksheet . . . must not be interpreted in any way as an opinion by myself or counsel, for that matter, concerning any degree of guilt of the accused."

During his instructions on sentencing, as noted in our analysis of Issue XVII, *supra* at 274, the military judge referred back to his earlier instructions regarding the findings worksheet and again cautioned them to ignore anything on the worksheet that could be interpreted as an expression of opinion by the military judge or counsel regarding the sentence. Counsel for both sides expressly stated that they had no objections to the instructions and did not request further instructions. We hold that no further instruction on the subject was required in the absence of a request for further elaboration or clarification. *See* RCM 920(f) (failure to object to instruction or omission of instruction constitutes waiver).

ISSUE XIX

WHETHER APPELLANT'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, AND ARTICLE 55, UCMJ, IN THAT THE MILITARY JUDGE'S INSTRUCTIONS ON DEATH SENTENCING PROCEDURES WERE INADEQUATE AND ERRONEOUS.

Appellant asserts three instructional deficiencies, which we will analyze separately.

A. *The military judge erred in failing to explicitly instruct that even if the members unanimously found one or more aggravating factors and even if the members unanimously determined that the extenuating and mitigating circumstances were substantially out-*

weighed by the aggravating factors, each member still had the absolute discretion to decline to impose the death sentence.

93. In support of this assertion of error, appellant relies on our guidance to the Court of Military Review on remand in *United States v. Curtis*, 33 MJ at 107 n. 8. In that case we said that the Court of Military Review should consider whether there must "be an explicit instruction to the effect that, even if the members unanimously find one or more aggravating factors and even if the members unanimously determine that the extenuating or mitigating circumstances are substantially outweighed by the aggravating factors, they will still have the absolute discretion to decline to impose the death sentence[.]"

We agree with defense counsel that the military death penalty procedures give the court-martial the absolute discretion to decline to impose the death penalty even if all the gates toward death-penalty eligibility are passed. The question is whether the military judge adequately advised the members that they had such discretion. We hold that he did.

The sentence worksheet (see Appendix) clearly speaks in terms of a permissible rather than mandatory death sentence. With respect to the aggravating factors, the worksheet instructs, "If the court-martial fails to find unanimously that at least one of the aggravating factors exist, you *may* not adjudge a sentence of death." (Emphasis added.) In his explanation of the worksheet, the military judge explained, "If these votes result in a unanimous finding that one or more circumstance has been proven, you *may* then consider, *along with all—with other possible sentences*, a sentence of death." (Emphasis added.)

94. Under the heading, "BALANCING OF AGGRAVATING AND EXTENUATING AND MITIGATING FACTORS," the worksheet instructs, "If the court-martial fails to unanimously find that any extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including the factor(s) found as indicated in PART A, then you *may* not adjudge a sentence of death." (Emphasis added.)

The third part of the sentence worksheet provides for forfeitures of pay, confinement for life, a bad-conduct or a dishonorable discharge, and a death sentence. In connection with the third part, the military judge instructed as follows:

> I believe I've given you the maximum authorized punishment that you may adjudge in this case and that is, once again, a sentence to death, Dishonorable Discharge, forfeiture of all pay and allowances. I've also given you a mandatory minimum sentence and that would be life in prison. So, Colonel, when I get back the worksheet, I should see on the worksheet, *either a sentence to death or life in prison.* All right. Anyway, there is that maximum sentence that you can adjudge in this case.
>
> Obviously, it's a ceiling on your discretion, *you are at liberty to arrive at any lesser sentence based upon your own evaluation of the evidence that has been presented to you. . . .*

(Emphasis added.)

The military judge instructed the members that the vote for a death sentence must be unanimous and that a sentence to life imprisonment must be agreed upon by a three-fourths majority. At the conclusion of his instructions the military judge asked the court members if they had any questions and received a negative indication. He then asked counsel for both sides if they had any objections or requests, and they both responded in the negative.

We hold that the court-martial was adequately instructed as to their absolute discretion regarding imposition of the death sentence. The sentence worksheet, combined with the military

judge's instructions, made it clear that the death penalty was not mandatory but only permissible, even if all the gates toward death-penalty eligibility were passed by unanimous vote.

B. *The military judge erred in failing to define or describe the nature and purpose of "extenuation and mitigation" evidence.*

95. Appellant contends that the military judge should have instructed on "the meaning and function of mitigating circumstances"; that he did not define the "legalistic terms" of "mitigation," "extenuation," and "aggravation"; and that his failure to do so warrants reversal of his death sentence. Final Brief at 269-71. We hold that the military judge did not err by failing to provide further definition in the absence of a request.

When the sufficiency of instructions is attacked, "[t]he ultimate question is whether there is a reasonable possibility that the jury understood the instructions in an unconstitutional manner." *Peek v. Kemp*, 784 F.2d 1479, 1489 (11th Cir.1986) (en banc), *citing Francis v. Franklin*, 471 U.S. 307, 322-23 n. 8, 105 S.Ct. 1965, 1975-76 n. 8, 85 L.Ed.2d 344 (1985), *cert. denied* in *Peek*, 479 U.S. 939, 107 S.Ct. 421, 93 L.Ed.2d 371 (1986). We agree with appellant that there is a heightened need for reliability in capital punishment cases. *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991-92, 49 L.Ed.2d 944 (1976). The Constitution does not require "any particular words or phrases to define the concept of mitigation or the function of mitigating circumstances. It is sufficient from a constitutional standpoint if it is clear from the entire charge considered in context that a reasonable jury could not have misunderstood the meaning and function of mitigating circumstances." *Peek v. Kemp*, 784 F.2d at 1494.

In this case the military judge listed all the aggravating circumstances presented by the prosecution as well as all the mitigating circumstances presented by the defense. In addition, he

instructed the members that they were permitted to consider evidence presented on the merits as well as the evidence in the sentencing hearing. He made it clear that aggravating factors and circumstances were presented by the prosecution in support of its request for the death penalty, and mitigating circumstances were presented by the defense in support of the lesser penalty of life imprisonment. While he did not furnish the members with technical legal definitions of "aggravation" and "mitigation," he made it clear what should be considered, by whom it was presented, for what purpose it was presented, and how aggravating circumstances and factors should be balanced against mitigating circumstances. In the absence of a specific request for clarification, no more was required.

C. *The military judge erred by failing to instruct the members as to the term "substantially outweighed" with regard to the relationship of mitigating circumstances to aggravating factors and circumstances.*

96. The military judge instructed the court members that they were not permitted to adjudge a death sentence unless they unanimously found "that any and all extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances." This language is taken from RCM 1004(b)(4)(C), which provides that death may not be adjudged unless "[a]ll members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under RCM 1001(b)(4), including the factors under subsection (c) of this rule." Appellant contends that the military judge's failure to define "substantially outweighed" was plain error.

The test was not designed to be "mechanical." Drafters' Analysis of RCM 1004, Manual, *supra* at A21-66 (Change 2). After the members have made findings on the aggravating factors and moved to the next step in the sentencing process, members are

not required to make findings on aggravating and mitigating circumstances. Instead, they are required only to "consider" each circumstance and individually decide which circumstances are aggravating or mitigating and whether the aggravating circumstances, including those factors found unanimously, "substantially outweigh" the mitigating circumstances. Unlike findings of guilty or findings regarding aggravating factors under RCM 1004(c), "specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." *Zant v. Stephens,* 462 U.S. at 876 n. 13, 103 S.Ct. at 2742 n. 13, *citing Jurek v. Texas,* 428 U.S. 262, 96 S. Ct. 2950, 49 L.Ed.2d 929 (1976).

The term "substantially outweighed" appears to have been taken from Mil.R.Evid. 403 and 609(b), Manual, *supra,* which use the same term with respect to the balance between probative value and prejudicial impact of evidence. Mil.R.Evid. 403 and 609(b) are identical to their counterpart Federal Rules of Evidence. In an evidentiary context, the term "substantially outweighed" is generally accepted as establishing a "slight presumption" to be applied in close cases. *See* S. Saltzburg & M. Martin, *Federal Rules of Evidence Manual* 160 (5th ed. 1990); S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual* 435 (3d ed. 1991).

97. In the context of aggravating and mitigating circumstances, a requirement that aggravating factors and circumstances "substantially outweighed" mitigating circumstances merely requires court members to tip the balance against the death penalty in close cases. If the court members misunderstood the military judge's instruction and applied a higher standard such as proof beyond a reasonable doubt or by a preponderance of the evidence, such a mistake would inure to the benefit of appellant, since it would weight the balance more heavily against imposition of the death penalty. Accordingly, we hold that appellant was not prejudiced by the absence of a definition of the term "substantially outweighed."

ISSUE XX

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ALLOWING THE TESTIMONY OF MRS. SHARBINO, THE VICTIM'S WIFE, WHEN HER TESTIMONY WAS CUMULATIVE, DID NOT CORROBORATE ANYTHING AND PREJUDICED APPELLANT BY INTRODUCING VICTIM IMPACT EVIDENCE INTO THE MERITS PORTION OF THE PROCEEDINGS.

The issue was resolved against appellant in our disposition of Issue IV, subissue G, *supra* 41 MJ aty 258.

ISSUES XXI, XXII, AND XXIII

WHETHER THE MILITARY JUDGE DENIED APPELLANT'S FIFTH AMENDMENT RIGHT TO DUE PROCESS AND A FAIR TRIAL WHEN HE TOLD THE PANEL THAT APPELLANT'S DEFENSE THEORY WAS "ABSOLUTELY RIDICULOUS" AND REFUSED TO GRANT A MISTRIAL.

WHETHER APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION WHEN THE MILITARY JUDGE DENIED TRIAL DEFENSE COUNSEL'S REQUEST TO TREAT NADIA PESSINA SIMMONS AS A HOSTILE WITNESS AND THEN RESTRICTED COUNSEL'S EXAMINATION OF HER CONCERNING HER ROLE IN THE CRIMES.

WHETHER THE MILITARY JUDGE'S REFUSAL TO PROVIDE AN ACCOMPLICE TESTIMONY INSTRUCTION TO THE MEMBERS REGARDING THE TESTIMONY OF NADIA PESSINA

SIMMONS VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, AND ARTICLE 55, UCMJ.

These three issues were resolved against appellant in our resolution of Issue IV, subissues J and I, *supra* 41 MJ at 264 and 260.

ISSUE XXIV

WHETHER THERE IS NO MEANINGFUL DISTINCTION BETWEEN PREMEDITATED AND UNPREMEDITATED MURDER ALLOWING DIFFERENTIAL TREATMENT AND SETENCING DISPARITY IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ.

98. Appellant argues that there is no meaningful difference between premeditated murder and unpremeditated murder. Accordingly, he argues that the military sentencing scheme fails constitutional muster because it does not "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Lowenfield v. Phelps*, 484 U.S. 231, 244, 108 S.Ct. 546, 554, 98 L.Ed.2d 568 (1988), *quoting Zant v. Stephens*, 462 U.S. at 877, 103 S.Ct. at 2742.

We hold that there is a meaningful distinction between premeditated and unpremeditated murder sufficient to pass constitutional muster. Premeditated murder requires proof of an additional element, "premeditated design to kill." Art. 118(1); para. 43b(1)(d), Part IV, Manual, *supra*. The phrase "premeditated design to kill" requires "consideration of the act intended." Para. 43c(2)(a). The Army Court of Military Review has described premeditated murder as a "killing . . . committed after reflection

by a cool mind." *United States v. Viola*, 26 MJ 822, 829, *citing* 2 *Wharton's Criminal Law* § 140 at 181 (C. Tortia, 14th ed. 1979), *aff'd*, 27 MJ 456 (CMA 1988). This Court has adopted the "cool mind" distinction. *United States v. Hoskins*, 36 MJ 343, 346 (1993). The Air Force Court of Military Review has observed, " 'Premeditation' is a term of art commonly employed and universally understood in the law of homicide." *United States v. Mansfield*, 33 MJ 972, 988 (1991), *aff'd on other grounds*, 38 MJ 415 (CMA 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1610, 128 L.Ed.2d 338 (1994). This Court has observed that, "[t]he words 'consideration of the act intended to bring about death' . . . have ordinary meanings and are readily understandable by court members." *United States v. Teeter*, 16 MJ 68, 72 (1983). We have no difficulty accepting the congressional determination that an intentional killing preceded by consideration of the fatal act with a "cool mind" is more serious and deserving of more severe punishment than an intentional killing without such consideration.

ISSUE XXV

WHETHER THE MILITARY JUDGE'S INSTRUCTIONS BLURRED ANY DISTINCTION BETWEEN THE OFFENSES OF PREMEDITATED AND UNPREMEDITATED MURDER AND DELETED THE REQUIRED ELEMENT OF "PREMEDITATION" FROM THE OFFENSE OF PREMEDITATED MURDER IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ.

99. In his instructions on the elements of the offenses, the military judge described the difference between premeditated and unpremeditated murder as follows: "[P]remeditated murder requires as an element that the accused have a 'premeditated de-

sign to kill.' Unpremeditated murder requires the specific intent to kill or inflict great bodily harm without premeditated—premeditation." After a court member asked whether premeditation must be "in the general sense" or "in the specific sense," the military judge instructed as follows:

> "Premeditated design to kill" means the formation of a specific intent to kill and consideration of the act intended to bring about death. The "premeditated design to kill" does not have to exist for a measurable or particular length of time. The only requirement is that it must precede the killing.

The military judge asked the court member, "Does that help out?" The member responded in the affirmative. There was no objection by either party to the instruction and no requests for clarification from counsel for either side or any court member.

Appellant now argues that the military judge blurred the distinction between premeditated and unpremeditated murder by instructing the court members that both premeditation and intent to kill may be inferred from circumstantial evidence and that no lapse of time is required for either premeditation or intent to kill, and by failing to define premeditation beyond "consideration of the act intended."

We hold that the military judge's instructions were correct and did not require amplification. The words of this Court in *United States v. Teeter, supra,* bear repeating:

> The words "consideration of the act intended to bring about death: are not terms of art. They have ordinary meanings and are readily understandable by court members. It does not appear that the court members had difficulty with the instruction since they did not request clarification. There is no requirement that length be substituted for clarity. . . .

16 MJ at 72. Furthermore, since defense counsel did not request further definition of the terms "premeditated" and "unpremeditated," the issue was waived. RCM 920(f).

Finally, we note that the evidence in this case did not require a fine distinction between momentary premeditation and an intentional but unpremeditated killing. The evidence overwhelmingly established that appellant considered murdering the cab drivers well before he fired the fatal gunshots.

ISSUE XXVI

WHETHER THE MILITARY JUDGE'S INSTRUCTIONS THAT ROBBERY REQUIRES A "CRIMINAL STATE OF MIND" WAS [SIC] IMPERMISSIBLY AMBIGUOUS AND LESSENED THE REQUIRED STANDARD IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ.

100. In connection with the charge of felony murder of Christopher Fay, the military judge instructed the court members on the seven elements of robbery with a firearm, as described in paragraph 47b, Part IV, Manual, *supra.* He described the first element as being "that, at Fort Hood, Texas, on or about 12 December 1988, the accused wrongfully took money from the possession and in the presence of Christopher L. Fay." He described the sixth element as being "that the taking of the property by the accused was with the intent to permanently deprive Christopher L. Fay and the Yellow Cab Company of the use and benefit of that property, that is, the cash." The military judge then defined wrongful taking, a term within the first element, as follows: "A taking is wrongful only when done without the consent of the owner and accompanied by a criminal state of mind."

In response to a question from a court member about the meaning of "criminal state of mind," the military judge defined

it as follows: "In other words, was it in the mind of the perpetrator to commit a crime . . . as opposed to some legal justification or excuse. . . ." The member indicated that he understood the definition. Counsel did not object to the definition or request further clarification.

Appellant now argues that the definition of wrongful taking in terms of a criminal state of mind rendered the element of specific intent in the sixth element ambiguous. We hold that the instruction was sufficient. On its face, the instruction distinguished between the specific intent to take the property and the criminal state of mind which makes the taking wrongful. In this case there was no issue of an innocent taking or a claim of right. *See, e.g., United States v. Kachougian,* 7 USCMA 150, 156, 21 CMR 276, 282 (1956); para. 46c(1)(d), Part IV, Manual, *supra.*

ISSUE XXVII

WHETHER THE INSTRUCTIONS TO THE COURT MEMBERS WHICH PURPORTED TO DEFINE REASONABLE DOUBT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY LESSENING THE GOVERNMENT'S BURDEN OF PROOF.

101. The military judge defined "reasonable doubt" as follows:

> By "reasonable doubt" is not intended a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in this case. It's an honest misgiving caused by insufficiency of proof of guilt. Proof beyond reasonable doubt means proof to a moral certainty, although not necessarily to an absolute or mathematical certainty. A "reasonable doubt" is a doubt which would cause a reasonably prudent person to hesitate to act in

> important and weighty personal affairs. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. . . .

Appellant did not object to the instruction at trial, but now contends that the instructions "constitute a prejudicial error by suggesting a degree of guilt below the reasonable doubt standard necessary for a conviction." Final Brief at 310. Appellant cites *Cage v. Louisiana,* 498 U.S. 39, 41, 111 S.Ct. 328, 330, 112 L.Ed.2d 339 (1990) (per curiam), in support of his argument.

This Court has considered an identical instruction and has resolved the issue adversely to appellant. *United States v. Meeks,* 41 MJ 150 (1994). *See Victor v. Nebraska,* __ U.S. __, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).

ISSUE XXVIII

WHETHER THE MILITARY JUDGE ERRONEOUSLY FAILED, *SUA SPONTE*, TO INSTRUCT THE PANEL MEMBERS IN BOTH PHASES OF THE COURT-MARTIAL THAT APPELLANT HAD THE RIGHT TO REMAIN SILENT AND HIS FAILURE TO TESTIFY COULD NOT BE CONSIDERED AGAINST HIM ADVERSELY.

102. Appellant did not testify. He concedes that he did not request an instruction concerning his silence, but he argues that the military judge had a *sua sponte* duty to instruct because a court member questioned his silence. Final Brief at 318.

Appellant relies on a question from a court member concerning the distinction between direct and circumstantial evidence. The member asked, "The statements. He made a videotaped statement and said—is that direct evidence—" The military judge responded, "Is that direct evidence or circumstantial evidence?

It's direct." The member still had questions, so the military judge told the members, "[D]on't get confused by the distinction . . . [T]he law really makes no distinctions between the two . . . You can use either direct evidence or circumstantial evidence to decide any issue in this case. Okay?" The member indicated that he understood.

The premise upon which appellant makes his argument is unsupported by the record. The court member did not question his silence, but was concerned only with whether appellant's videotaped confession was direct or circumstantial evidence. We hold that the military judge was not required to instruct *sua sponte* concerning appellant's failure to testify.

ISSUE XXIX

WHETHER THE MILITARY JUDGE ERRED IN FAILING TO GRANT A DEFENSE MOTION FOR CHANGE OF VENUE OR FAILING TO SEQUESTER THE PANEL.

103. As we noted in our disposition of Issue IV, subissue A, *supra*, an accused is entitled to a change of venue only when pretrial publicity creates "so great a prejudice against the accused that the accused cannot obtain a fair and impartial trial." RCM 906(b)(11) Discussion; *United States v. Gravitt*, 5 USCMA at 256, 17 CMR at 256. The military judge's ruling is reviewed for abuse of discretion. *Id.; United States v. Carter*, 9 USCMA 108, 112, 25 CMR 370, 374 (1958). We hold that the military judge did not abuse his discretion.

In an effort to minimize the effects of pretrial publicity, the convening authority detailed officers who had arrived at Fort Hood after January 1, 1989, or were assigned to commands outside Fort Hood. On January 31, 1989, the military judge issued an order directing trial counsel to inform all primary and alternate selectees "not to discuss with anyone the facts and circumstances of this case and further to refrain from intentionally listening [to] or reading any news or other accounts" pertaining to the charges against appellant. After individual *voir dire* and at the conclusion of each day's proceedings the military judge cautioned the members against discussing the case or intentionally exposing themselves to media coverage.

The military judge announced that he would be liberal in granting challenges for cause based on pretrial publicity. He invited the defense to renew the motion for change of venue if it appeared difficult to select an impartial panel.

After challenges by both sides, eight officers remained on the panel. COL Aylor, the president of the panel, was from Fort Sill, Oklahoma. The remaining seven officers were from Fort Hood. The *voir dire* of these eight officers revealed nothing to justify a change of venue. During general *voir dire*, no member indicated having obtained any information "through official channels" about the case. Six of the eight (MAJ Wilson, MAJ Napoli, CPT Weiss, CPT Williams, CW4 Giebner, and CW3 Hasenauer) indicated that they had heard about the case through the media. Two officers (MAJ Wilson and CPT Williams) had seen references to the case on television.

104. During individual *voir dire*, COL Aylor and MAJ Staples indicated having no media exposure to the case. The other six officers recalled some media coverage in general terms but could not remember specifics. The defense challenged none of the six for cause.

In light of the absence of any indication that the court members were influenced by pretrial publicity, the decision of defense counsel not to challenge any members for cause based on exposure to pretrial publicity, and the careful efforts of the convening authority and military judge to insulate court members from publicity about the case, we are satisfied that the military judge acted well within his discretion when he denied the motion for a change of venue and the request to sequester the court members.

ISSUE XXX

WHETHER THE MILITARY JUDGE'S WRONGFUL RESTRICTION OF VOIR DIRE ON THE ISSUES OF BUMPER STICKERS, VOLUNTEER WORK, DIVORCE, COMBAT EXPERIENCE, AND BOXING, AND CATEGORIZATION OF TRIAL DEFENSE COUNSEL'S TACTICS AS A "WASTE OF TIME," CHILLED COUNSEL'S VOIR DIRE QUESTIONING AND DENIED APPELLANT A FAIR TRIAL UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, AND ARTICLE 55, UCMJ.

We resolve this issue against appellant for the reasons set out in our disposition of Issue IV, subissue E, *supra* at 255.

ISSUES XXXI AND XXXII

WHETHER THE CONVENING AUTHORITY WAS RACIALLY BIASED AGAINST APPELLANT AS SEEN BY HIS INSISTENCE ON HAVING RACIAL IDENTIFIERS IN THE JURY POOL SELECTION SHEETS, THE DISPROPORTIONATE PERCENTAGE OF BLACKS IN THE JURY POOL AS COMPARED TO THE POPULATION OF BLACKS AT FORT HOOD, AND THE ACTIONS TAKEN BY THE CONVENING AUTHORITY AFTER HE PICKED AN ALL WHITE JURY IN A BLACK-ON-WHITE CRIME WHERE APPELLANT IS BLACK.

WHETHER APPELLANT WAS DENIED HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS BECAUSE THE PANEL MEMBER SELECTION POOL DID NOT INCLUDE ANY FEMALES.

105. At trial appellant challenged the referral and member selection process, arguing that blacks and females were underrepresented. We hold that appellant has failed to make a *prima facie* showing of either racial or gender discrimination.

Appellant's case initially was referred to the general court-martial appointed by Court-Martial Convening Order (CMCO) 1. The senior officer on that order, COL Burch, is black. All the remaining court members, including the enlisted members, were white, except for MAJ Castro, reflected as "other." (Appellate Exhibit (App. Ex.) LII at 9-15.)

Although there were no female officers detailed as primary members of that panel, the evidence presented by the defense reflects that in January 1989, when the convening authority, Major General (MG) Streeter, selected panels for general courts-martial and special courts-martial, including the panel detailed on CMCO 1, there were 11 woman nominated and 9 selected for court-martial duty. One officer (MAJ Nowack) was among 7 officers detailed to serve on BCD special courts-martial. Of the 30 officers detailed as alternate members for general courts-martial and special courts-martial, 4 were women: CPT Lutz, Alternate #2; CPT Johnson, Alternate #6; and First Lieutenant (1LT) Cruz, Alternate #17; 1LT Thomas, Alternate #22. Of the 20 enlisted soldiers detailed as alternate members for general courts-martial and special courts-martial, 4 were women: Specialist Jones, Alternate #4; SGT Darymple, Alternate #8; SSG Brownlow, Alternate #12; and SGT Holiday, Alternate #15.

On or about February 15, 1989, in order to minimize the impact of pretrial publicity, MG Streeter withdraw appellant's case from the court-martial appointed by CMCO 1. The staff judge advocate (SJA) had prepared a pool of nominees, officer and enlisted, who had arrived at Fort Hood after January 1. (App. Ex. XLI at 11-12.) Because the pool of eligible nominees included so few senior officers, the SJA requested additional officer nominees in the grades of colonel and lieutenant colonel

from commands outside Fort Hood. (R. 23) A new pool of 45 nominees composed of officers from both Fort Hood, Texas, and Fort Sill, Oklahoma, was prepared. In that pool were four black officers from Fort Hood: MAJ Staples, MAJ Taylor, CPT Austin, and Chief Warrant Officer 3 Mark. MAJ Stapes and MAJ Taylor were selected as alternate members. All primary selectees were white males. (App. Ex. LXVIII at 10-12; CMCO 4.)

106. On February 21, 1989, appellant requested that enlisted members be detailed to his court-martial. That request was motivated in part to obtain "a more representative panel." In response to appellant's request for enlisted members, the SJA presented MG Streeter with a roster of all enlisted personnel who had arrived at Fort Hood after January 1, 1989. (App. Ex. XLVII at 3-14.)

If soldiers in pay grades E-1 and E-2 are excluded, there were 181 eligible nominees on the roster. *See United States v. Yager*, 7 MJ 171 (CMA 1979) (soldiers below pay grade E-3 unlikely to meet requirements of Article 25, UCMJ, 10 USC § 825). There were 158 males (87.3% of the total); and 23 females (12.7% of the total). There were 106 whites (58.6% of the total) and 57 blacks (31.5% of the total). MG Streeter selected 6 primary enlisted members, of whom 4 were black (66.7% of those selected), and 1 was female (16.7% of those selected).

MG Streeter also selected 11 alternate enlisted members of which 5 were black (45.5% of the total) and 2 were female (18.2% of the total). In the aggregate, of 17 enlisted soldiers selected for court-martial duty as either primary or alternate members, MG Streeter selected 9 blacks (53% of that total) and 3 females (17.6% of that total).

On March 23, 1989, appellant withdrew his request for enlisted members and requested an all-officer panel. On March 24, MG Streeter relieved the enlisted members and detailed 5 additional officers, including MAJ Staples, a black male. Five alternate members were designated, including MAJ Taylor, a black male. (App. Ex. LXVIII at 1-3; CMCO 8.)

Appellant attacks the selection process on three grounds. He asserts that he was denied his Sixth Amendment right to trial by a "jury" composed of a fair "cross-section of the community." He further asserts that blacks and females were systematically excluded in violation of the Due Process Clause of the Fifth Amendment and Article 25. Lastly, appellant suggests that his court-martial was "stacked" with white males to ensure that a death sentence would be adjudged. Final Brief at 347-48.

107. The Supreme Court addressed the Sixth Amendment "fair cross-section" requirement in *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), holding:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

439 U.S. at 364, 99 S.Ct. at 668. The "fair cross-section" requirement of the Sixth Amendment applies only to the pool of eligible jurors, not to the jury that was actually empaneled, "absent a pattern of systematic exclusion of a particular class," *United States v. Olson*, 846 F.2d 1103, 1117 n. 16 (7th Cir. 1988).

In *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), the Supreme Court addressed a claim of systematic exclusion in the context of the Equal Protection Clause of the Fourteenth Amendment which applies to the United States through the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). The Supreme Court held that proof of systematic exclusion requires proof of the following:

> The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as [jurors], over a significant period of time. . . . Finally . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. . . .

430 U.S. at 494, 97 S.Ct. at 1280 (citations omitted). *See Morgan v. United States,* 696 F.2d 1239, 1240 (9th Cir.1983) ("claim of unconstitutionally selected jury implicates" Sixth Amendment as well as "the Fourteenth Amendment right to equal protection of the laws incorporated in the Due Process Clause of the Fifth Amendment").

When a Fifth Amendment or Fourteenth Amendment violation is asserted, statistics may be used to prove discriminatory intent. *Alston v. Manson,* 791 F.2d 255, 257-59 (2d Cir. 1986), *cert. denied,* 479 U.S. 1084, 107 S.Ct. 1285, 94 L.Ed.2d 143 (1987). A *prima facie* case of systematic exclusion is not established by the absence of minorities on a single panel. *See Castaneda v. Partida,* 430 U.S. at 494, 97 S.Ct. at 1280 (underpresentation proved by comparing population "to the proportion called to serve . . . over a signfiicant period of time"); *Ramseur v. Beyer,* 983 F.2d 1215, 1235 (3d Cir.1992) (underrepresentation not provided where "length of time documented . . . was only two years"); *Dobbs v. Kemp,* 809 F.2d 750, 752 (11th Cir.) (underrepresentation of women on a single jury list insufficient to make *prima facie* showing of discrimination), *cert. denied,* 481 U.S. 1059, 107 S.Ct. 2203, 95 L.Ed.2d 858 (1987).

108. Appellant points to inclusion of racial and gender identifiers on the lists of nominees in support of his assertion of

racial and gender discrimination. We will not presume improper motives from inclusion of racial and gender identifiers on lists of nominees for court-martial duty. We observed in *Un ed States v. Green,*37 MJ 380, 384 (CMA 1993), that "a convening authority is not required to be race-ignorant; he or she is only required to be race-neutral." Race and gender identifiers are neutral; they are capable of being used for proper as well as improper reasons.

Turning first to appellant's claim of a Sixth Amendment violation, we hold that appellant is not entitled to a "jury" composed of a fair cross-section of the community. The Sixth Amendment right to trial by a jury which is a fair cross-section of the community has long been recognized as inapplicable to trials by court-martial. *Ex Parte Quirin,* 317 U.S. 1, 39-41, 63 S.Ct. 2, 16-17, 87 L.Ed. 3 (1942); *Ex Parte Milligan,* 71 U.S. (4 Wall.) 2, 137-38, 18 L.Ed. 281 (1866). This Court has observed that "Article 25 of the Uniform Code, 10 USC § 825; contemplates that a court-martial panel will not be a representative cross-section of the military population." *United States v. Smith,* 27 MJ 242, 248 (CMA 1988), *quoting United States v. Santiago-Davila,* 26 MJ 380, 389 (CMA 1988).

Even assuming arguendo that appellant was entitled to a representative cross-section of the eligible military population on his court-martial, he has not made his case. The limited relevant evidence presented by the defense, *i.e.,* the roster of enlisted personnel who arrived at Fort Hood after January 1, 1989, shows that blacks (67.7% v. 31.5%), and women (16.7% v. 12.7%) (*see* 41 MJ at 284), were overrepresented, not underrepresented, among the enlisted members detailed to sit on his case. *See* 41 MJ at 284.

Likewise, with respect to appellant's Fifth Amendment claim, we hold that appellant has failed to make a *prima facie* showing of systematic exclusion of eligible officers and enlisted soldiers. In support of the challenge to the court-martial selection pro-

cess, defense counsel presented demographic data for Fort Hood and Fort Sill as of mid-February 1989, showing the population by gender as well as by race. (App. Ex. XLI at 63 & 64.) In rejecting the defense challenge, the military judge characterized the raw demographic data as "somewhat irrelevant."

109. We agree with the military judge's characterization of the population data submitted by the defense in support of their motion. The population figures merely show the racial, ethnic, and gender breakdown of the military population of Fort Hood and Fort Sill as of mid-February 1989. They do not reflect how many black officers and female officers arrived at Fort Hood after January 1, 1989. Furthermore, they do not reflect the numbers or percentages of officers ineligible for court-martial duty. *See* paras. 7-2 thru 7-6, Army Regulation 27-10, Legal Services: Military Justice (1 July 1984) (chaplains; medical, dental, and veterinary officers; Army nurses; Army Medical Specialist Corps officers; and inspectors general ineligible for court-martial duty). Finally, they do not reflect the numbers or percentages of enlisted personnel in the lowest pay grades, who are unlikely to meet the requirement that they be "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperment." Art. 25(d)(2). *See United States v. Yager*, 7 MJ 171.

The defense presented no evidence of the number of black officers and female officers eligible for court-martial duty who arrived at Fort Hood between January 1 and February 15, 1989, the day the new panel was selected. Likewise, the defense presented no evidence that there were any black officers or female officers in the grades of colonel and lieutenant colonel at Fort Sill who were eligible and available for court-martial duty.

MG Streeter's reason for narrowing the pool of eligible court members was race-neutral and gender-neutral, as well as favorable to appellant. It was not challenged at trial or on appeal.

Trial counsel represented that MG Streeter routinely included blacks on courts-martial and on occasion even detailed blacks

who were not nominated by their respective commands for court-martial duty. Defense counsel did not dispute trial counsel's assertion. To the contrary, defense counsel stated that he will "stipulate" that blacks "routinely" were included on courts-martial appointed by MG Streeter.

The selection of enlisted members is the only selection process for which accurate population data was made a part of the record. The evidence presented at trial by the defense (App. Ex. XLVII at 3-14) reflects that in the enlisted ranks, both blacks and females were detailed in numbers greater than their proportion of the eligible population. *See* 41 MJ at 285-286.

110. Nevertheless, appellant asserts that the absence of blacks and females on the all-officer, all-white panel to which his case was referred establishes a constitutional violation. We reject his assertion for three reasons. First, as noted above, a *prima facie* claim of discrimination is not established by the absence of minorities on a single panel. Second, the panel about which appellant complains is not the panel that heard his case. Finally, when appellant objected to an all-white, all-male panel, the convening authority responded appropriately to his objection. He answered appellant's request for enlisted members by detailing blacks and females in numbers exceeding their proportionate share of the eligible population. The panel which actually heard the case included one black officer as a primary member; another black officer had been designated as an alternate. *See* 41 MJ at 284. Appellant has presented no evidence of tokenism and no evidence that female officers or other black officers who were eligible and available were improperly excluded from consideration.

111. The final issue is whether there is evidence of court stacking. *See United States v. Hilow*, 32 MJ 439, 441 (CMA 1991) (court stacked with supporters of "hard discipline"); *United States v. Smith*, 27 MJ 242 (CMA 1988) (female member added in case involving indecent assault on female officer); *United*

States v. Hedges, 11 USCMA 642, 29 CMR 458 (1960) (five of nine court members involved in law enforcement). Court stacking in courts-martial can occur by systematic exclusion. *See United States v. McClain*, 22 MJ 124 (CMA 1986) (systematic exclusion of junior officers and NCOs below E-7 to prevent "unusual" sentences); *United States v. Daigle*, 1 MJ 139 (CMA 1975) (warrant officers and lieutenants excluded); *United States v. Greene*, 210 USCMA 232, 43 CMR 72 (1970) (court membership limited to senior officers). Where systematic exclusion is consistent with Article 25, it may be permissible. *See United States v. Yager*, 7 MJ 171 (systematic exclusion of personnel below pay grade E-3 permissible because those grades are unlikely to meet requirements of Article 25). Appellant has presented no evidence that court members were either added or excluded for reasons that violate the Constitution or Article 25.

On the record before us, we hold that appellant has failed to make a *prima facie* showing of noncompliance with Article 25 or the systematic exclusion of otherwise qualified court members based on race or gender. Among the officer population, he has not shown how many blacks or females were eligible and available, or that any eligible black or female officers were excluded from consideration. Among the enlisted population, the evidence produced by the defense showed that black and female soldiers were selected in numbers greater than their proportionate share of the eligible population. Since appellant failed to make a *prima facie* showing that blacks and females were improperly excluded from participation in his court-martial, the military judge properly rejected appellant's challenge to the process by which his court-martial was convened.

ISSUE XXXIII

WHETHER APPELLANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS,

AND ARTICLE 55, UCMJ, BECAUSE HE WAS TRIED IN A PEACETIME CAPITAL CASE BY A COURT-MARTIAL PANEL (I.E. JURY) COMPOSED OF LESS THAN TWELVE MEMBERS.

This issue was resolved against appellant in *United States v. Curtis*, 32 MJ at 267-68.

ISSUE XXXIV

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT WHEN HE RULED THAT THE SPECIFICATIONS TO BOTH ROBBERY CHARGES COULD BE AMENDED AFTER ARRAIGNMENT WHEN THE EVIDENCE CLEARLY SHOWED THAT THE MODIFICATIONS CHANGED ESSENTIAL PORTIONS OF THE ELEMENTS TO THE OFFENSES AND THEREBY CONSTITUTED MAJOR CHANGES DEMANDING DISMISSAL OF THE CHARGES.

112. As originally drafted, specifications 1-3 of Charge III alleged that the money taken from the three cab drivers was the property of the individual drivers "and the Kelly Taxi Cab Company." After arraignment but before entry of pleas, trial counsel learned that the cab drivers worked for Yellow Cab Company, even though they drove Kelly cabs. Over defense objection, trial counsel amended the specifications to allege that the money was taken from the three individual cab drivers "and the Yellow Cab Company." Although defense argued that the change was major, the military judge ruled that it was not.

Minor changes may be made after arraignment; major changes may not be made without preferring charges anew. RCM 603(c) and (d). RCM 603(a) provides, "Minor changes in charges and specifications are any except those which add a party, offenses.

or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged."

We hold that the changes were "minor." Pleading the name of the individual cab drivers' employers was unnecessary in this case; pleading the names of the individual drivers would have been sufficient. The focus of the case was on the individual drivers, not their employer. There is no possibility that appellant was misled.

ISSUE XXXV

WHETHER THE COURT-MARTIAL LACKED JURISDICTION TO TRY APPELLANT BECAUSE THE PRETRIAL ADVICE WAS INITIALLY DEFECTIVE AND THEN CURED BY A NEW PRETRIAL ADVICE WITHOUT REREFERRAL OF CHARGES.

113. On January 23, 1989, the staff judge advocate (SJA) prepared his pretrial advice to the convening authority as required by Article 34, UCMJ, 10 USC § 834. The case abstract attached to that advice contained several mistakes: it listed appellant's age as "0"; it indicated that he was "restricted" when in fact he was in pretrial confinement; and it omitted appellant's service awards.

On February 9, 1989, appellant asked the military judge to order a new pretrial advice. After trial counsel advised the military judge that the SJA intended to correct his pretrial advice, add a memorandum expressing appellant's concerns about the pretrial advice, and determine whether the convening authority desired to adhere to his previous decision, a corrected and expanded pretrial advice was submitted to the convening authority on February 14, 1989. In addition to correcting the errors in the original advice, the SJA identified which offenses were capital and advised the convening authority of the mitigating factors

which appellant desired him to consider. The convening authority adhered to his previous decision to refer the charges to a general court-martial as a capital case.

Article 34(a) mandates, "Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate for consideration and advice." The SJA must state "in writing" whether each "specification is warranted by the evidence," and whether "a court-martial would have jurisdiction over the accused and the offense," and must recommend the action to be taken. *See* RCM 406. The SJA need not set out his legal "analysis or rationale." There is no legal requirement to summarize the evidence, discuss aggravating or mitigating factors, or list the recommendations of subordinate commanders. RCM 406, Discussion. Defects in the pretrial advice are not jurisdictional, but are tested for prejudice. Art. 59(a), UCMJ, 10 USC § 859(a); *United States v. Murray*, 25 MJ 445, 447 (CMA 1988).

We hold that the factual errors in the original pretrial advice were not jurisdictional, were corrected by the supplemental advice, and were not prejudicial to appellant.

ISSUES XXXVI AND XXXVII

WHETHER THE STAFF JUDGE ADVOCATE WAS DISQUALIFIED FROM PARTICIPATING IN THE PROCEEDINGS AFTER THE INITIAL PRETRIAL ADVICE WAS CHALLENGED AS DEFECTIVE.

WHETHER THE CONVENING AUTHORITY WAS DISQUALIFIED FROM PARTICIPATING IN THE PROCEEDINGS AFTER THE INITIAL PRETRIAL ADVICE AND CAPITAL REFERRAL WERE CHALLENGED AS DEFECTIVE.

114. Appellant contends that because the SJA's pretrial advice and the convening authority's action based on that advice

were challenged at trial, based on the mistaken entries in the pretrial advice discussed in Issue XXXV, *supra* at 288, both the SJA and the convening authority were disqualified. We hold that neither officer was disqualified.

Neither the SJA nor the convening authority was placed in the position of weighing their own credibility or resolving an issue regarding the correctness of their decisions. The SJA recognized that his original advice contained factual errors and he corrected those errors without being ordered to do so by the military judge. Thus, there were no legal or factual issues to be resolved. Accordingly, neither the SJA nor the convening authority was disqualified. *See United States v. Choice*, 23 USCMA 329, 331, 49 CMR 663, 665 (1975).

ISSUE XXXVIII

WHETHER THE RECORD OF TRIAL MUST BE RETURNED TO THE CONVENING AUTHORITY FOR NEW RECOMMENDATION AND ACTION BECAUSE A SUBSTANTIAL PORTION OF THE FINDINGS INSTRUCTION WAS NOT AUTHENTICATED UNTIL MORE THAN TWO YEARS AFTER THE CONVENING AUTHORITY'S ACTION.

115. The record of trial was authenticated by Judge Saynisch on June 5, 1989. A member of the defense team, Captain Smart, acknowledged on June 6 that he had examined the record of trial. A copy of the SJA's post-trial recommendation was served on CPT Ibbotson, lead defense counsel on June 6. On June 19, CPT Ibbotson certified that he had read the post-trial recommendation and the authenticated record of trial, and he submitted matters for consideration by the convening authority in accordance with RCM 1105 and 1106. He did not challenge the accuracy or completeness of the record.

On November 15, 1991, the Clerk of the Court, U.S. Army Court of Military Review, pointed out in a letter to the convening authority that page 1500 was missing from the record and requested the convening authority to correct the record. Judge Saynisch executed a certificate of correction which transcribed and inserted the contents of the missing page. Page 1500 was one of 38 pages of instructions on findings and contained some of the procedural instructions for deliberation and voting. Appellant now argues that the convening authority's action was based on an unauthenticated record and was therefore invalid. He cites an opinion of the Court of Military Review, *United States v. Batiste*, 35 MJ 742, 744 (ACMR 1992), in which "the substantive proceedings in their entirety" (guilty plea inquiry, findings, sentence hearing, and sentence) were not properly authenticated.

We hold that a new recommendation and action are not required. We regard the omission in this case as more akin to the minor omission in *United States v. Martinez*, 27 MJ 730 (ACMR 1988), rather than to the failure to authenticate most of the record, as occurred in *Batiste*. The initial record of trial in appellant's case was properly authenticated, and the certificate of correction was properly authenticated. RCM 1104(d)(1) authorizes the return of an incorrect or incomplete record to the convening authority for correction. RCM 1104(d)(2) authorizes the military to execute a certificate of correction.

"The convening authority is not required to review the [record] for legal . . . or factual sufficiency." RCM 1107(b)(1); *see* RCM 1107(c), Discussion. Defense counsel did not challenge the completeness of the record after examining it and did not contest the legal sufficiency of the instructions contained on the then-missing page. There is no reasonable possibility that that missing page affected the convening authority's decision. Accordingly, there is no reasonable possibility of prejudice. Art. 59(a).

ISSUE XXXIX

WHETHER THE ARMY COURT OF MILITARY REVIEW ABUSED ITS DISCRETION BY REFUSING TO SIT *EN BANC* IN APPELLANT'S CASE.

116. Appellant's conviction and sentence were affirmed by the Court of Military Review on February 3, 1992. 34 MJ 956. On February 24 appellant filed a petition for reconsideration and suggestion for reconsideration *en banc*. On March 3, 1992, the suggestion was not adopted, and the petition was denied on April 15, 1992. 34 MJ 1065, 1066. Appellant now asserts that the Court of Military Review abused its discretion by refusing to hear his case *en banc*.

Article 66(a), UCMJ, 10 USC § 866(a), provides that a Court of Military Review "may sit in panels or as a whole in accordance with rules prescribed under subsection (f)," and that "[a]ny decision of a panel may be reconsidered by the court sitting as a whole." In accordance with subsection (f) the Judge Advocate General of all services have promulgated Joint Rules of Practice and Procedure. Courts of Military Review, Rules of Practice and Procedure, March 1, 1985. *See* 22 MJ CXXVII. Rule 17(a) of those Rules provides as follows:

> A majority of the judges present for duty may order that any appeal or other proceeding be considered or reconsidered, except as indicated in section (c) below, by the Court sitting as a whole. Such consideration or reconsideration ordinarily will not be ordered except (1) when consideration by the full Court is necessary to secure or maintain uniformity of decision, or (2) when the proceedings involve a question of exceptional importance, or (3) when a sentence being reviewed pursuant to Article 66 extends to death.

22 MJ at CXXXIII.

Appellant argues that he has been denied equal treatment because earlier capital cases were heard *en banc* but his was not. We find this "me, too" argument unpersuasive. The Joint Rules clearly contemplate that reconsideration is discretionary, not mandatory, and that reconsideration *en banc* is the exception rather than the rule.

117. At the time appellant filed his suggestion for reconsideration *en banc*, the Army Court of Military Review had already addressed many significant constitutional issues involved in capital cases in *United States v. Murphy*, 30 MJ 1040 (ACMR 1990) (en banc), *remanded*, 36 MJ 8 (CMA 1992), *record returned for mandatory review*, 38 MJ 184 (1993); *United States v. Dock*, 26 MJ 620 (ACMR 1988) (en banc); and *United States v. Matthews*, 13 MJ 501 (ACMR 1982) (en banc). The Army court also had the benefit of the Navy-Marine Corps Court of Military Review's wisdom in *United States v. Curtis*, 28 MJ 1074 (1989) (en banc), as well as the guidance from this Court in *United States v. Curtis*, 33 MJ 101; *United States v. Curtis*, 32 MJ 252; *United States v. Dock*, 28 MJ 117 (CMA 1989), *decision on further review*, 40 MJ 112 (CMA 1994); and *United States v. Matthews*, 16 MJ 354 (CMA 1983). We hold that the Court of Military Review did not abuse its discretion by not adopting the suggestion for reconsideration *en banc*.

ISSUE XL

WHETHER THE ARMY COURTS PROPORTIONALITY REVIEW IN THIS CASE WAS INSUFFICIENT AS A MATTER OF LAW.

118. Appellant contends that the proportionality review by the court below in this case was flawed because it "fails to give any indication as to what criteria were examined or how those criteria were weighed." Final Brief at 374. Appellant argues that this Court should set up proportionality standards of review simi-

lar to those adopted by New Jersey. Final Brief at 375-79. Lastly, appellant conducts his own proportionality review, using military "death-eligible" cases tried within 3 years of appellant's case and asserts that appellant's sentence is disproportionate. Final Brief at 379-83.

The Supreme Court has held that a proportionality review is not required by the Eighth Amendment if the sentencing procedure sufficiently narrows the class of individuals subject to the death penalty. *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). In *United States v. Curtis*, 32 MJ 252, 270-71 (CMA 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 406, 116 L.Ed.2d 354 (1991), this Court held that proportionality review is not required by the Constitution but is required by Article 66(c). *But see United States v. Murphy*, 36 MJ 8, 9 (CMA 1992) (Crawford, J., dissenting). During our second review of *Curtis*, we gave the following general guidance: "[I]t would be fitting for the Court of Military Review to consider generally similar cases reviewed by the Supreme Court of the United States in which state courts have imposed the death penalty for like crimes on that basis." *United States v. Curtis*, 33 MJ at 109.

In appellant's case the Court of Military Review followed our *Curtis* guidance and used a computer search to examine cases reviewed by the Supreme Court since *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), concluding "that the sentence is generally proportional to those imposed by other jurisdictions in similar situations." 34 MJ at 969. The Court of Military Review specifically relied on five cases involving murder for pecuniary gain: *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (robbery and murder of 7-Eleven store clerk); *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (defendant robbed and murdered victim by shooting him in the head); *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) (defendant robbed and killed a pizza delivery man); *Blystone v.*

Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990) (defendant robbed and killed a hitchhiker); and *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (murder in the course of a burglary).

119. We hold that the proportionality review conducted by the Court of Military Review complies with Article 66 and our guidance in *Curtis*.

ISSUE XLI

WHETHER THE MILITARY DEATH PENALTY SCHEME IS INVALID DUE TO *FURMAN V. GEORGIA*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) AND THE SEPARATION OF POWERS DOCTRINE.

The issue was resolved against appellant in *United States v. Curtis*, 32 MJ at 260-67.

ISSUE XLII

WHETHER THE DEATH PENALTY SENTENCING STANDARD REQUIRING AGGRAVATING FACTORS TO "SUBSTANTIALLY OUTWEIGH" EXTENUATING AND MITIGATION (SIC) CIRCUMSTANCES IS IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS IN THAT THE ONLY ACCEPTABLE STANDARD MUST BE "BEYOND A REASONABLE DOUBT." SEE ALSO ARTICLE 59(a), UCMJ.

We resolve this issue against appellant for the reasons set out in our resolution of Issue XIX, *supra*. *See Zant v. Stephens*, 462 U.S. 862, 875 and n. 13, 103 S.Ct. 2733, 2742 and n. 13, 77 L.Ed.2d 235 (1983) (specific standards for balancing aggravating against mitigating circumstances not constitutionally required).

ISSUE XLIII

WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR BY FAILING TO INSTRUCT THE MEMBERS ON SENTENCING AS TO THE TERM "SUBSTANTIALLY OUTWEIGHED" WITH REGARD TO THE RELATIONSHIP OF MITIGATING CIRCUMSTANCES TO AGGRAVATING FACTORS.

We resolve this issue against appellant for the reasons set out in our resolution of Issues XIX and XLII, *supra* 41 MJ at 276 and 291.

ISSUE XLIV

WHETHER ARTICLE 18, UCMJ, 10 USC § 818 AND RCM 201(F)(1)(C), WHICH REQUIRE TRIAL BY MEMBERS IN A CAPITAL CASE, VIOLATE THE FIFTH AND EIGHTH AMENDMENT GUARANTEES OF DUE PROCESS AND A RELIABLE VERDICT.

We resolve this issue against appellant for the reasons set out in *Singer v. United States*, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965), and *United States v. Matthews*, 16 MJ at 363.

ISSUE XLV

APPELLANT HAS BEEN DENIED EQUAL PROTECTION OF THE LAW REGARDING APPOINTMENT OF LEAD APPELLATE DEFENSE COUNSEL.

120. Appellant contends that he has been denied equal protection of the law because "[t]he U.S. Army is the only branch of the armed forces that makes no concrete distinction in case assignments between appellate counsel assigned to death-penalty cases and counsel assigned to other cases." Appellant argues that he has been treated unfairly because other services provide appellate counsel for death penalty cases in the grade of major or lieutenant commander and reduce their workload.

We reject appellant's argument for the reasons set out by the court below. 34 MJ at 1066-67. In addition we note that the breadth and depth of the issues raised, briefed, and argued before this Court reflect a level of representation far above the standards of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.E.2d 674 (1984). We note further that appellant's complaints about the military grade of his appellate counsel are belied by the signature blocks on his brief before this Court, which reflect his representation by a lieutenant colonel, a major, and two captains, and the signature blocks on his brief before the court below, which reflects representation by a colonel and two captains.

ISSUE XLVI

WHETHER THE GOVERNMENT'S ATTEMPT TO RECONSTRUCT DEFENSE COUNSEL'S OPENING STATEMENT REGARDING PRESENTENCING (APP. EXH. CL) DUE TO THE COURT REPORTER'S FAILURE TO RETURN FROM A RECESS BEFORE THE COURT RECONVENED WAS INSUFFICIENT TO SATISFY THE REQUIREMENT THAT THE RECORD BE VERBATIM.

We resolve this issue against appellant for the reasons set out by the court below. 34 MJ at 966-67.

ISSUE XLVII

WHETHER THE MILITARY JUDGE IMPROPERLY DENIED A DEFENSE MOTION TO HAVE

THE MEMBERS IGNORE A PORTION OF THE GOVERNMENT'S SENTENCING ARGUMENT REQUESTING THAT THE MEMBERS VINDICATE SOCIETY'S VICTIMS.

Trial counsel argued during presentencing that "Americans, members of society, need to know that they will be protected and that we will protect and we will vindicate society's victims." Defense counsel objected to the reference to vindicating victims. The military judge overruled the objection.

We hold that the military judge correctly overruled the objection. The thrust of the defnse argument was that general deterrence is irrelevant in a capital context. However, this Court has held that general detrerence is a relevant factor in sentencing. *United States v. Lania,* 9 MJ 100 (CMA 1980). To the extent that the argument also invoked retribution and vindication of wrongs, we hold that the argument was proper. *See Gregg v. Georgia,* 428 U.S. 153, 183-84, 96 S.Ct. 2909, 2929-30, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (retribution and vindication of wrongs are permissible sentencing objectives).

ISSUE XLVIII

WHETHER THE MILITARY JUDGE ERRED IN ALLOWING TRIAL COUNSEL TO QUESTION WITNESSES REGARDING APPELLANT'S REMORSE OR LACK THEREOF AND ARGUE THAT APPELLANT LACKED REMORSE AND COMPOUNDED THE ERROR BY INSTRUCTING THAT LACK OF REMORSE COULD BE CONSIDERED AS AN AGGRAVATING FACTOR. *CF. UNITED STATES V. EDWARDS,* 35 MJ 351 (CMA 1992); *LESKO V. LEHMAN,* 925 F.2d 1527 (3d Cir.), *CERT. DENIED,*__ U.S. __, 112 S.Ct. 273, 116 L.Ed.2d 226 (1991).

121. Contrary to the suggestion, implied through the citations in the assignment of error, trial counsel did not expressly or impliedly comment on appellant's silence at trial. The propriety of trial counsel's presentation of evidence regarding appellant's lack of remorse is resolved in our discussion of Issue III, subissue I, *supra* at 250 and Issue IV, subissue H, *supra* at 259.

ISSUE XLIX

WHETHER APPELLANT WAS DENIED THE POTENTIAL MITIGATION THAT A GUILTY PLEA WOULD HAVE AFFORDED HIM.

This issue was resolved against appellant in *United States v. Dock,* 28 MJ 117, and *United States v. Matthews,* 16 MJ 354.

ISSUE L

WHETHER THE PRESIDENT EXCEEDED HIS AUTHORITY UNDER THE CONSTITUTION AND ARTICLE 36, UCMJ, IN PROMULGATING RULE FOR COURTS-MARTIAL 1004.

This issue was resolved against appellant in *United States v. Curtis,* 32 MJ 252, and *United States v. Matthews,* 16 MJ 354.

ISSUE LI

WHETHER THE DEATH PENALTY PROVISION OF ARTICLE 118, UCMJ, IS UNCONSTITUTIONAL AS IT RELATED TO TRADITIONAL COMMON LAW CRIMES THAT OCCUR IN THE UNITED STATES IN TIME OF PEACE.

We resolve this issue against appellant for the reasons stated in the decision of the court below. 34 MJ at 967. *See United States v. Schafer,* 13 USCMA 83, 85-86, 32 CMR 83, 85-86 (1962).

ISSUE LII

WHETHER ARTICLE 118 FAILS TO COMPLY WITH THE REQUIREMENTS OF *FURMAN V. GEORGIA*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), IN THAT CONGRESS HAS NOT ENACTED ANY CHANGE TO ARTICLE 118, UCMJ, WHICH WOULD SUFFICIENTLY NARROW THAT CLASS OF INDIVIDUALS THAT WARRANT A DEATH SENTENCE.

122. We resolve this issue on the basis of our decisions in *United States v. Matthews*, 16 MJ 354, and *United States v. Curtis*, 32 MJ 252. In *Matthews*, we held that either the President or Congress could remedy the defects in military capital sentencing procedures. 16 MJ at 380. In *Curtis* we examined the procedures promulgated by the President in RCM 1004 and found them consistent with the Eighth Amendment. 32 MJ at 257-69.

ISSUE LIII

WHETHER APPELLANT'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT BECAUSE THE CAPITAL REFERRAL SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER VIOLATING THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Appellant argues that the capital referral system is arbitrary and capricious because each convening authority has absolute discretion to refer a case as capital or non-capital if the case involves an offense for which death is an authorized punishment. We resolve this issue against appellant for the reasons set out by the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct.

2909, 49 L.Ed.2d 859 (1976). Referring to prosecutorial discretion to seek the death penalty or to plea bargain, the Supreme Court stated:

> The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularlized circumstances of the crime and the defendant.

428 U.S. at 199, 96 S.Ct. at 2937. A convening authority exercises prosecutorial discretion by deciding, with the advice of his or her SJA, whether a case will be prosecuted and whether the death penalty will be authorized for a capital offense. *See United States v. Baker*, 14 MJ 361, 365 (CMA 1983) ("[T]he decision to prosecute . . . is made by a convening authority with advice from his staff judge advocate. . . ."), *overruled on other grounds*, *United States v. Teters*, 37 MJ 370, 376 (CMA 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 919, 127 L.Ed.2d 213 (1994). In the absence of evidence of arbitrary or discriminatory exercise of prosecutorial authority in this case, we hold that the Eighth Amendment was not violated by referring appellant's case as capital.

ISSUE LIV

WHETHER THE IMPOSITION OF THE DEATH PENALTY VIOLATED APPELLANT'S RIGHT TO EQUAL PROTECTION UNDER THE FIFTH AMENDMENT BECAUSE RULE FOR COURTS-MARTIAL 1004 SUBJECTED APPELLANT, AS A MEMBER OF THE ARMED FORCES, TO A PENALTY WHICH IS NOT OTHERWISE AVAILABLE UNDER THE CRIMINAL CODE OF THE UNITED STATES FOR IDENTICAL CRIMINAL CONDUCT.

123. Appellant argues that congressional failure to amend the criminal code of the United States deprives him of equal protection because it subjects him to the death penalty solely because of his military status. We reject appellant's argument several reasons.

First, *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), did not hold that the death penalty was unconstitutional, but only that the capital sentencing procedures violated the Eighth Amendment. Second, civilians are subject to the death sentence in state courts (such as those in Texas) if the state courts follow constitutionally acceptable procedures. Third, Congress authorized the death penalty for certain drug-related offenses, including murder, when it eanacted the Anti-Drug Abuse Act of 1988, Title VII, 102 Stat. 4387, 21 USC § 848(e). Accordingly, we hold that appellant has not been deprived of equal protection of the laws by virtue of his status as a member of the armed forces.

ISSUE LV

WHETHER THE AGGRAVATING FACTORS ENUMERATED IN RCM 1004(c)(7)(I) FAIL TO SUFFICIENTLY CLARIFY THE FACTORS INVOLVED OR NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AND THE RULE IS THEREFORE INVALID UNDER THE FIFTH AND EIGHTH AMENDMENTS.

We resolve this issue against appellant for the reasons set out in our decision in *United States v. Curtis*, 32 MJ at 260-67.

ISSUE LVI

WHETHER THE PEREMPTORY CHALLENGE PROCEDURE IN THE MILITARY JUSTICE SYSTEM, WHICH ALLOWS THE GOVERNMENT TO REMOVE ANY ONE JUROR WITHOUT CAUSE, CONSTITUTES AN UNCONSTITUTIONAL VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS IN CAPITAL CASES, WHERE THE PROSECUTOR IS FREE TO REMOVE A MEMBER WHOSE MORAL BIAS AGAINST THE DEATH PENALTY DOES NOT JUSTIFY A CHALLENGE FOR CAUSE.

We resolve this issue against appellant on both legal and factual grounds. RCM 912(g) specifically authorizes one peremptory challenge by the prosecution and one by the defense. The Supreme Court has refused to strike down the peremptory challenge process. *See Batson v. Kentucky*, 476 U.S. 79, 98-99, 106 S.Ct. 1712, 1724, 90 L.Ed.2d 69 (1986) ("While we recognize . . . that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice."); 476 U.S. at 107, 106 S.Ct. at 1729 (Marshall, J., concurring) ("I would not find [banning prosecution peremptories entirely] an acceptable solution."); 476 U.S. at 133, 106 S.Ct. at 1742 (Burger, C.J., dissenting). ("An institution like the peremptory challenge that is part of the fabric of our jury system should not be casually cast aside. . . ");

476 U.S. at 137, 106 S.Ct. at 1744 (Rehnquist, J., dissenting) (peremptory challenge"has been described as "a necessary part of trial by jury' ").

124. As a matter of law, trial counsel would be entitled to challenge for cause a member who was likely, because of moral bias against the death penalty, to be unable "to give meaningful consideration to imposing a death penalty." *United States v. Curtis*, 33 MJ at 107, *citing Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); and *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). There is no legal impediment to trial counsel's challenging peremptorily a member who would be subject to challenge for cause.

Factually, appellant's contention is unsupported by the record. The prosecution exercised its peremptory challenge against Lieutenant Colonel Griffith, who indicated on *voir dire* that he could vote for the death penalty if the crime warranted it.

ISSUE LVII

WHETHER DUE PROCESS REQUIRES THAT TRIAL AND INTERMEDIATE APPELLATE JUDGES IN A PEACETIME MILITARY DEATH PENALTY CASE HAVE THE PROTECTION OF A FIXED TERM OF OFFICE.

We resolve this issue against appellant for the reasons set out in *United States v. Graf*, 35 M.J. 450 (CMA 1992), *cert. denied*, __ U.S. __, 114 S.Ct. 917, 127 L.Ed.2d 206 (1994).

ISSUE LVIII

WHETHER THE SYSTEM WHEREBY THE JUDGE ADVOCATE GENERAL OF THE ARMY APPOINTS TRIAL AND APPELLATE JUDGES TO SERVE AT HIS PLEASURE IS UNCONSTITU-

TIONAL AS IT VIOLATES THE APPOINTMENTS CLAUSE OF THE CONSTITUTION. U.S. CONST. ART. II, § 2, ¶ 2, CL. 2; *FREYTAG V. COMMISSIONER OF INTERNAL REVENUE*, 501 U.S. 868, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991). *BUT SEE UNITED STATES V. WIESS*, 36 MJ 224 (CMA 1992).

This issue was resolved against appellant in *Weiss v. United States*, __ U.S. __, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994).

ISSUE LIX

WHETHER ARTICLE 142(B)(2)'S LIMITATION OF COURT OF MILITARY APPEALS JUDGES TO TERMS OF OFFICE OF FIFTEEN YEARS VIOLATES ARTICLE III, SECTION 1, U.S. CONSTITUTION, WHICH GUARANTEES LIFE TERM OF OFFICE TO JUDGES OF INFERIOR COURTS AS THE CONGRESS MAY ESTABLISH.

We resolve this issue against appellant for the reasons set out in *Palmore v. United States*, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973), and *United States v. Matthews*, 16 MJ at 365.

ISSUE LX

WHETHER APPELLANT HAS BEEN DENIED EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FIFTH AMENDMENT IN THAT ALL CIVILIANS IN THE UNITED STATES ARE AFFORDED THE OPPORTUNITY TO HAVE THEIR CASES REVIEWED BY AN ARTICLE III COURT, BUT MEMBERS OF THE UNITED STATES MILITARY BY VIRTUE OF THEIR STATUS AS SERVICEMEMBERS ARE NOT.

125. We reject appellant's argument on several grounds. First, in *Palmore v. United States, supra,* the Supreme Court recognized the authority of Congress to provide for criminal trials and criminal appeals in the District of Columbia before judges of Article I courts who do not have life tenure and salary. Second, in *Palmore,* the Supreme Court also recognized that state court judges also do not enjoy life tenure and salary. Finally, this appellant is entitled under Article 67a, UCMJ, 10 USC § 867a, to seek review by an Article III court—the Supreme Court.

ISSUE LXI

WHETHER THIS COURT LACKS THE JURISDICTION AND THE AUTHORITY TO REVIEW THE CONSTITUTIONALITY OF THE RULES FOR COURTS-MARTIAL AND THE UNIFORM CODE OF MILITARY JUSTICE BECAUSE THIS COURT IS AN ARTICLE I COURT, NOT AN ARTICLE III COURT WHICH HAS THE POWER OF CHECKING CONGRESS AND THE EXECUTIVE BRANCHES UNDER *MARBURY V. MADISON,* 5 U.S. (1 CRANCH) 137, 2 L.Ed. 60 (1803). *SEE ALSO COOPER V. AARON,* 358 U.S. 1, 18, 78 S.Ct. 1401, 1409, 3 L.Ed.2d 5 (1958) (THE POWER TO STRIKE DOWN UNCONSTITUTIONAL STATUTES OR EXECUTIVE ORDERS IS THE EXCLUSIVE CHECK OF THE ARTICLE III JUDICIARY.).

We resolved this issue against appellant in *United States v. Matthews,* 16 MJ at 364-68.

ISSUE LXII

WHETHER MILITARY DUE PROCESS AND FUNDAMENTAL NOTIONS OF FAIRNESS REQUIRE THAT EACH MEMBER OF THE COURT-MARTIAL SIGN HIS OR HER NAME TO THE DEATH-

SENTENCE WORKSHEET OR THAT THE CONDEMNED ACCUSED BE AFFORDED THE RIGHT AND OPPORTUNITY TO POLL THE MEMBERS. *SEE UNITED STATES V. CURTIS* (*CURTIS II*), 33 MJ at 110 (COX, J., CONCURRING). *BUT SEE* RCM 922(e).

RCM 922(e) prohibits polling members about their vote on fidings; RCM 1007(c) prohibits polling about the sentence. The drafters believed that polling would be contrary to Article 39(b), UCMJ, 10 USC § 839(b), and 51(a), UCMJ, 10 USC § 851(a), which protect the secrecy of deliberations and provide for voting by secret written ballot. Drafter's Analysis of RCM 922(e) and 1007(c), Manual, *supra* at A21-61 and A21-68.1 (Change 2). Where a less than unanimous vote is involved, we share the concerns of the drafters about potential command influence on junior members who would be compelled to reveal their votes if polling were permitted. Where the vote is unanimous, those concerns about command influence would appear to be unfounded.

In appellant's case, defense counsel did not ask to poll the members on either findings or sentence. Therefore, we hold that any issue regarding polling the members was waived.

ISSUE LXIII

WHETHER THE ROLE OF THE CONVENING AUTHORITY IN THE MILITARY JUSTICE SYSTEM DENIED APPEALLANT A FAIR AND IMPARTIAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, BY ALLOWING THE CONVENING AUTHORITY TO ACT AS A GRAND JURY IN REFERRING CRIMINAL CASES (CAPITAL CASES) TO TRIAL, PERSONALLY APPOINTING JURORS OF HIS CHOICE, HOLDING THE ULTIMATE LAW ENFORCEMENT FUNCTION

WITHIN HIS COMMAND, AND ACTING AS THE FIRST LEVEL OF APPEAL, THUS CREATING AN APPEARANCE OF IMPROPRIETY IN A PERCEPTION THAT HE ACTS AS PROSECUTOR, JUDGE, AND JURY. *SEE UNITED STATES V. JOBSON*, 31 MJ 117 (CMA 1990) (COURTS-MARTIAL SHOULD BE "FREE FROM SUBSTANTIAL DOUBT AS TO LEGALITY, FAIRNESS, AND IMPARTIALITY.").

126. Appellant makes a broad-based attack on virtually every aspect of the convening authority's role without briefing the issue. Final Brief at 423. We will briefly address each aspect of his attack.

A. Grand Jury

The Fifth Amendment expressly excludes "cases arising in the land or naval forces" from the requirement for indictment by grand jury. Nevertheless, Article 32, UCMJ, 10 USC § 832, was intended to provide a substitute for the grand jury. In many respects, Article 32 confers rights on an accused which are denied a civilian before a grand jury. For example, an accused is entitled to appear at the Article 32 hearing, have appointed counsel, cross-examine the witnesses against him, examine the evidence against him, and present matters in defense, extenuation, or mitigation if he desires. See Art. 32(b); RCM 405(f). Contrary to appellant's assertion, the Article 32 investigating officer, not the convening authority, acts as a "grand jury."

B. Appointment of Court Members

The convening authority appoints officers, and if requested by the accused, enlisted persons "who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperment." *See* RCM 502(a)(1); Art. 25(d)(2), UCMJ, 10 USC § 825(d)(2). As discussed in our resolution of Issues XXXI and XXXII, 41 MJ at 286, any attempts at court stacking are grounds for reversal of the conviction or sentence. Article 37(a) prohibits any attempts to influence the court members, and Article 98, UCMJ, 10 USC § 898, makes it a criminal offense to do so.

C. Law Enforcement Authority

Although he or she is responsible as commander for maintaining discipline within the command, a convening authority who attempts to influence a court-martial is criminally liable, as noted above. In addition, any attempt to intimidate or dissuade witnesses from testifying, influence court members, influence the recommendations of subordinates regarding disposition of charges, or to chill a vigorous defense, will furnish grounds for reversal of the findings and sentence. *See, e.g., United States v. Thomas*, 22 MJ 388 (CMA 1986), *cert. denied*, 479 U.S. 1085, 107 S.Ct. 1289, 94 L.Ed.2d 146 (1987).

D. First Level of Appeal

127. The action of the convening authority is more accurately described as a review rather than an appeal. "The convening authority is not required to review a case for . . . legal sufficiency." RCM 1107(b). The process is a "one-way street" for an accused because the convening authority may set aside a conviction or reduce a sentence for any reason, but may not direct reconsideration of an acquittal or increase the sentence. Art. 60(e)(2), UCMJ, 10 USC § 860(e)(2) (1983); RCM 1107.

E. Conclusion

The military justice system has withstood Constitution attack on several occasions, most recently in *Weiss v. United States*, __ U.S. __, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994), and *Solorio v.*

United States, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987). Appellant has provided no legal basis for his broad based attack on the convening authority's role in the system, and we reject it for the reasons stated above.

ISSUE LXIV

WHETHER THE CAPITAL SENTENCING PROCEDURE IN THE MILITARY IS UNCONSTITUTIONAL BECAUSE THE MILITARY JUDGE DOES NOT HAVE THE POWER TO ADJUST OR SUSPEND A SENTENCE OF DEATH THAT IS IMPROPERLY IMPOSED.

We resolve this issue against appellant for the following reasons. First, although a military judge may not adjust or suspend a sentence, he may declare a mistrial under RCM 915. Second, the convening authority may set aside or reduce the sentence for any reason. RCM 1107(d)(1) and 1108(b). Third, the Court of Military Review, exercising its plenary *de novo* review authority pursuant to Article 66(c), may set aside an unlawful sentence or reduce a sentence it deems inappropriate. *See* RCM 1203.

ISSUE LXV

WHETHER COURT-MARTIAL ORDER NO. 19 IS DEFECTIVE IN THAT THE DATE FOR CHARGE II AND ITS SPECIFICATION (VIOLATION OF ARTICLE 80, UCMJ, 10 USC § 880 ATTEMPTED MURDER) IS INCORRECT AND SHOULD INSTEAD REFLECT 13 DECEMBER 1988 AS THE DATE OF THE OFFENSE, FOR MR. HARRISON DID NOT PICK UP APPELLANT AND MS. PESSINA FROM THE NUBIA TEMPLE UNTIL 1 A.M. ON THE 13TH (R. 929.)

We decline to act on this issue which asserts no legal error. *See* R. 1426.

ISSUE LXVI

WHETHER APPELLANT, AN INDIGENT ACCUSED, WAS DENIED EQUAL PROTECTION OF THE LAWS AND A FAIR TRIAL AS MANDATED BY THE FIFTH AMENDMENT WHEN HE WAS REFUSED AN EXPERT OF HIS OWN CHOOSING, DR. WISE, TO ASSIST HIM IN HIS DEFENSE FOR PURPOSES OF MEDICAL ANALYSIS, JURY SELECTION AND SENTENCING, WHILE THE GOVERNMENT WAS ABLE TO FORUM SHOP FOR ITS OWN FORENSIC EXPERTS THAT IT WANTED. *SEE AKE V. OKLAHOMA*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); *GRIFFIN V. ILLINOIS*, 351 U.S. 12, 17-18, 76 S.Ct. 585, 589-90, 100 L.Ed. 891 (1956); *CALDWELL V. MISSISSIPPI*, 472 U.S. 320, 323 n. 1, 105 S.Ct. 2633, 2637 n. 1, 86 L.Ed.2d 231 (1985); AND *WYGANT V. JACKSON BOARD OF EDUCATION*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986).

We resolve this issue against appellant for the reasons set out in our disposition of Issue II, *supra* at 239.

ISSUE LXVII

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE REFUSED TO ALLOW TRIAL DEFENSE COUNSEL TO STIPULATE TO THE ROBBERIES TO FORCE THE GOVERNMENT TO MAKE THEIR ELECTION PRETRIAL ON WHICH CHARGES THEY WOULD PRESENT TO THE PANEL. *SEE UNITED STATES V. DOCK*, 28 MJ 117, 118 (CMA 1989) (ACCEPTABLE PRACTICE IN CAPITAL CASE TO STIPULATE TO LESSER INCLUDED OFFENSES); *UNITED*

STATES V. MOBLEY, 28 MJ 1024 (AFCMR 1989), *REMANDED*, 31 MJ 273 (CMA 1990), *AFF'D*, 36 MJ 34 (CMA 1992).

128. Appellant suggested a stipulation to the robbery offenses, but trial counsel refused to stipulate. A stipulation may not be received unless all parties agree to its admission. RCM 811(c). Since trial counsel did not desire to stipulate, the military judge could not require him to do so. We hold that the military judge did not abuse his discretion.

ISSUE LXVIII

WHETHER THE SYSTEM OF APPOINTING CAPITAL DEFENSE COUNSEL IN THE MILITARY IS INADEQUATE TO SERVE THE NEEDS OF A DEATH SENTENCED ACCUSED SUCH AS APPELLANT IN THAT THE MILITARY SYSTEM CANNOT PROVIDE ADEQUATE CONTINUITY OF COUNSEL OR ENSURE CONFLICT FREE COUNSEL AS IS EVIDENCED IN THIS CASE.

In a broad-based attack on the manner in which military counsel are appointed for both trial and appeal, appellant asserts multiple problems relating to the workload and experience of counsel, continuity problems caused by reassignments and departures from active duty, and potential conflicts of interest.

Turning first to appellant's counsel at the court-martial, we held with respect to Issues II and III, *supra* at 239 and 241, that appellant was competently represented. With respect to the experience level of trial defense counsel, we note the recitals of each defense counsel on the record at the beginning of *voir dire*.

At the time of appellant's court-martial, Major Hayden, individual military counsel, had been on active duty as an officer over 12 years. He had been a lawyer for over 4 years, had spent 3 years as a prosecutor, had spent 1 year in graduate-level legal

education, and was currently serving as senior defense counsel at Fort Hood.

129. Captain Ibbotson had served "several years" as a field artillery officer, had previously served as a prosecutor at Fort Bragg, North Carolina, and was currently serving as the senior defense counsel for the 1st Cavalry Division at Fort Hood.

CPT Smart had engaged in the civilian practice of law, joined the Army Judge Advocate General's Corps in January, 1988, and had been serving as a defense counsel for about 8 months.

Turning to the appellate counsel in this case, we note that appellant was represented by four military counsel before the Court of Military Review, including Colonel Robert B. Kirby. 34 MJ at 958. COL Kirby had previous experience in appellate litigation of capital cases, having been one of the appellate counsel in *United States v. Murphy*, 30 MJ at 1045. Before this Court appellant was represented by four military counsel, including a major and a lieutenant colonel. *See* Issue XLV, *supra* at 291. We accept as common knowledge the fact that a lieutenant colonel in the Judge Advocate General's Corps will have been admitted to practice and have litigation experience in excess of the minimums prescribed by the ABA Guidelines. *See* Issue LXX, *supra* at 300.

To the extent that appellate counsel have lacked experience or suffered from lack of continuity, the impact has been on the efficiency of judicial administration rather than the quality of representation. Appellant's court-martial concluded on April 3, 1989. The case was argued before the Court of Military Review on December 9, 1991, and that Court issued its initial decision on February 3, 1992. 34 MJ 956. *See* decision denying petition for reconsideration on April 15, 1992. 34 MJ 1065. Oral argument before this Court was on September 30, 1993, almost 4½ years after the trial and almost 18 months since the final decision of the Court of Military Review.

130. Recognizing the potential inefficiencies noted above, both the court below and this Court have liberally granted ex-

tensions of time and allowed filing of supplemental pleadings and citations of authority even after oral argument. This Court has considered issues not raised before the court below. Although we have declined to apply the principle of *in favorem vitae* (Issue VI, *supra* at 266), we have accommodated counsel to the maximum extent possible to ensure that all issues are considered. Defense appellate counsel concede that their pleadings have been voluminous, with overlapping and redundant assignments of error. Final Brief at 436 n. 152. We are satisfied that every conceivable legal and factual issue has been raised and briefed.

Turning to appellant's argument regarding potential conflicts of interest, we note that appellant concedes that potential conflicts of interest by appellate counsel were resolved in his case before they ripened into actual conflicts of interest. Appellant has alleged no conflicts of interest among trial defense counsel, and we have found none. On the basis of the record before us, we hold that appellant has been afforded conflict-free counsel.

ISSUE LXIX

WHETHER APPELLATE DEFENSE COUNSEL AT THE ARMY COURT WERE INEFFECTIVE AND DENIED APPELLANT HIS RIGHT TO COMPETENT COUNSEL UNDER THE SIXTH AMENDMENT WHEN EACH FAILED TO DO AN ADEQUATE INVESTIGATION AND FAILED TO RAISE A GREAT NUMBER OF VIABLE ISSUES IN THIS CASE.

131. Appellate counsel raised this same issue unsuccessfully before the Court of Military Review. As they did before the court below, they have not identified in what particulars the investigation was inadequate or what additional issues should have been raised. Implied in this assertion is a claim that appellate counsel cannot, because of their inexpertise, identify what else they should have done.

We find this assertion of ineffectiveness unsupported by the record and the contrary well established. The purpose of appellate review is not to retry the case, but to review the trial for compliance with the law. Nevertheless, under the umbrella of an exhaustive assignment of errors, appellate counsel have virtually relitigated the entire case. As we noted in our discussion of Issue LXVIII, *supra* at 298, counsel have raised, albeit sometimes redundantly and sometimes belatedly, an exhaustive array of factual, evidentiary, procedural, and constitutional issues.

ISSUE LXX

WHETHER DUE PROCESS REQUIRES THAT THIS COURT ESTABLISH MINIMUM STANDARDS FOR TRIAL AND APPELLATE DEFENSE COUNSEL IN CAPITAL CASES.

Appellant advocates that this Court mandate compliance with the *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (ABA Guidelines) (Feb.1989). We decline to do so. Those Guidelines expressly provide "for such exceptions to the Guidelines as may be appropriate in the military." ABA Guidelines, Introduction at ii. The Guidelines further recognize that the limited resources and the general experience level of an office might require modification of the qualifications, stating as follows:

> For example, the resources and experience of the office might justify allowing an otherwise qualified attorney within that office to act as lead counsel after somewhat less than five years of personal litigation experience (Guideline 5.1.1.A(ii)) but could not justify allowing an attorney within that office to act as death penalty counsel after only minimal personal criminal litigation experience.

Commentary, Guideline 5.1 at 63. As we noted in our discussion of Issue LXVIII, *supra*, appellant was provided with two seasoned trial lawyers at his court-martial and several experienced appellate lawyers before the Court of Military Review and this Court.

132. Appellate defense counsel have repeatedly invited this Court to involve itself in the internal personnel management of the military services, and we have repeatedly declined the invitation. *See United States v. Weiss*, 36 MJ 224 (CMA 1992), *aff'd*, __ U.S. __, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994) (appointment of military judges); *United States v. Graf*, 35 MJ 450 (CMA 1992), *cert. denied*, __ U.S. __, 114 S.Ct. 917, 127 L.Ed.2d 206 (1994) (*aff'd sub nom. Weiss v. United States*, __ U.S. at __-__, 114 S.Ct. at 760-63)) (terms of office for military judges); *United States v. Mitchell*, 39 MJ 131 (CMA), *cert. denied*, __ U.S. __, 115 S.Ct. 200, 130 L.Ed.2d 131 (1994) (officer-fitness reports for appellate military judges).

The Supreme Court has held that limited experience does not raise a presumption of ineffectiveness. *United States v. Cronic*, 466 U.S. 648, 665, 104 S.Ct. 2039, 2050, 80 L.Ed.2d 657 (1984). The quality of representation compelled by the Constitution is determined by reference to *Strickland v. Washington, supra*. In our resolution of Issues II and III, *supra* at 239 and 241, we have determined that the constitutional standard was met at the trial level in this case.

133. For the foregoing reasons, we decline to mandate minimum standards based on years of practice or numbers of cases tried. We hold that appellant was represented with a degree of competence well above the constitutional minimums at his court-martial, before the Court of Military Review, and before this Court. Accordingly, we further hold that appellant has not been denied due process by the absence of formal standards for trial and appellate defense counsel.

DECISION

The decision of the United States Army Court of Military Review (34 MJ 956, *recon. denied*, 34 MJ 1065) is affirmed.

Judges COX and CRAWFORD concur.

APPENDIX

UNITED STATES)
)
vs)
) SENTENCE WORKSHEET
LOVING, DWIGHT J.)
PVI, US Army)
065-86-0228)
B Btry, 1st Bn, 82nd FA)
1st Cavalry Division)
Fort Hood, Texas 76545-5130)

AGGRAVATING FACTORS

NOTE: If the court adjudges a death sentence, the President shall indicate which aggravating factor(s) have been proven, and strike out any not proven. If a death sentence is not adjudged, the aggravating factors portion of this document should be nullified by marking a large 'X' across it.

PART A

AGGRAVATING FACTORS

Private E-1 Dwight J. Loving, this court-martial unanimously finds, beyond a reasonable doubt, that the following aggravating factor(s) (has)(have) been proven:

	YES	NO	
1.	(X)	( )	The premeditated murder of Bobby Gene Sharbino was committed while the accused was engaged in the commission or attempted commission of a robbery.
2.	(X)	( )	Having been found guilty of the felony murder of Christopher Fay as set forth in specification 3 of Charge I, the accused was the actual perpetrator of the killing.
3.	(X)	( )	Having been found guilty of premeditated murder of Bobby Gene Sharbino, the accused was also found guilty of another violation of Article 118, UCMJ, in the same case.

(If the court-martial fails to find unanimously that at least one of the aggravating factors exist, you may not adjudge a sentence of death.)

ATTACHED IS CXL

PART B

BALANCING OF AGGRAVATING AND MITIGATING FACTORS

Announce: The court-martial unanimously finds any extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including the factor(s) found as indicated in PART A.

Yes X Now No _____

(If the court-martial fails to unanimously find that any extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including the factor(s) found as indicated in PART A, then you may not adjudge a sentence of death.)

PART C

SENTENCE

NOTE: After the court has reached a sentence, the President shall circle the punishment(s) selected and accomplish any necessary filling in or crossing out within the punishment(s) selected.

Private E-1 Dwight J. Loving, this court-martial sentences you:

FORFEITURES

To forfeit $_____ pay per month for _____ months.

To forfeit all pay and allowances.

CONFINEMENT

To be confined for your natural life.

PUNITIVE DISCHARGE

To be discharged from the service with a (bad conduct discharge) (dishonorable discharge).

DEATH

To be put to death.

Note: A court-martial has no authority to suspend a sentence or any part of a sentence.

_____
(Signature of President)

BEST AVAILABLE COPY

SULLIVAN, Chief Judge (concurring in part and in the result):

134. I agree with the majority opinion on all of the issues in this case except Issues XXXI and XXXII. I concur, however, in the result on those issues. Before discussing them, however, I think some further comment on Issue I is warranted.

ISSUE I

WHETHER APPELLANT'S SENTENCE OF DEATH MUST BE SET ASIDE AND ONLY A LIFE SENTENCE AFFIRMED BECAUSE THE PANEL MEMBERS FOLLOWED IMPROPER VOTING PROCEDURES DURING THE SENTENCING DELIBERATIONS.

Appellant uses affidavits from three members of his court-martial to raise concern whether his panel disregarded the military judge's instructions for imposing a sentence. *See United States v. Bourchier,* 5 USCMA 15, 26-27, 17 CMR 15, 26-27 (1954); *United States v. Higdon,* 2 MJ 445, 455 (ACMR 1975). I note that several state courts have recently considered the propriety of raising such an issue by means of post-trial questioning of jurors and have resolved it against defendants, even in capital cases. *People v. Towns,* 157 Ill.2d 90, 191 Ill.Dec. 24, 35-36, 623 N.E.2d 269, 279-80 (1993); *Colvin-el v. State,* 332 Md. 144, 630 A.2d 725, 745 (1993); *Johnson v. State,* 593 So.2d 206, 210 (Fla. 1992); *People v. Morris,* 53 Cal.3d 152, 279 Cal.Rptr. 720, 807 P.2d 949, 997-98 (1991); *State v. Russell,* 733 P.2d 162, 164 (Utah 1987). While one of those jurisdictions might approve such a practice, even it recognizes that Fed.R.Evid. 606(b) does not allow impeachment of a verdict on this basis. *See People v. Perez,* 4 Cal.App. 4th 893, 908 n. 13, 6 Cal.Rptr.2d 141, 149 n. 13 (4th Dist. Div. 1 1992). As noted by the majority, Mil.R.Evid. 606(b), Manual for Courts-Martial, United States, 1984, is based on Fed.R.Evid. 606(b).

The critical question thus becomes whether these juror affidavits establish that influence of rank was employed in the deliberations to achieve imposition of the death sentence. *See* Mil.R.Evid. 606(b). I think not for several reasons. *First,* these affidavits were solicited by appellate defense counsel on the general procedures followed in deliberations. They were not instigated by any member complaining of unlawful influence of rank. *Second,* none of these affidavits expressly alleged unlawful influence of rank by the court-martial president. *Third,* despite Judge Wiss' argument to the contrary, none of the affidavits reasonably implied use of rank by the president to impose sentence-deliberation rules new or different from those given by the judge. In light of the role of the president of a court-martial, Judge Wiss' argument could be made in any case where a member says sentencing instructions were not followed in deliberations. The bottom line is that the Mil.R.Evid. 606(b) exception has not been shown to be applicable in this case.

Issue XXXI

The above issue states:

WHETHER THE CONVENING AUTHORITY WAS RACIALLY BIASED AGAINST APPELLANT AS SEEN BY HIS INSISTENCE ON HAVING RACIAL IDENTIFIERS IN THE JURY POOL SELECTION SHEETS, THE DISPROPORTIONATE PERCENTAGE OF BLACKS IN THE JURY POOL AS COMPARED TO THE POPULATION OF BLACKS AT FORT HOOD, AND THE ACTIONS TAKEN BY THE CONVENING AUTHORITY AFTER HE PICKED AN ALL WHITE JURY IN A BLACK-ON-WHITE CRIME WHERE APPELLANT IS BLACK.

Appellant's Claim

135. Appellant in his brief complains that the judge improperly ignored "the specter of racism" raised in this case with respect to the convening authority's selection of soldiers to sit as members of his court-martial. Final Brief at 336. He generally references the decision of this Court in *United States v. Smith*, 27 MJ 242 (1988). He then asks that this case be remanded for a hearing so the convening authority can explain his purpose in using racial identifiers in the member selection process. He again refers to decisions of this Court in *United States v. DuBay*, 17 USCMA 147, 37 CMR 411 (1967); *United States v. Moore*, 28 MJ 366 (1989); and *United States v. Santiago-Davila*, 26 MJ 380 (1988).

Legal Nature of Appellant's Claim

My starting point in addressing Issues XXXI is its particular wording. Unlike Issue XXXII, it does not assert that the convening authority purposefully excluded a cognizable group (blacks) from sitting on appellant's court-martial in violation of the Fifth and Sixth Amendments to the Constitution. Instead, it asserts that certain conduct by the convening authority evidenced racism on his part and appellant's brief further asserts that *the military judge erred by not calling him into court to provide an explanation for this conduct.* The asserted legal basis for this judicial error is our summary decisions on use of racial identifiers in the military justice system (*e.g., United States v. Brannon*, 33 MJ 179 (CMA 1991). *See generally United States v. Green*, 37 MJ 380 (CMA 1993)) and Supreme Court cases applying the Due Process Clause of the Fifth Amendment or the Fourteenth Amendment's Equal Protection Clause to prohibit purposeful exclusion of minority persons from grand and petit juries. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct.

667, 98 L.Ed. 866 (1954). *See generally United States v. Greene*, 36 MJ 274 (CMA 1993)..

Elements of Appellant's Claim

136. Appellant cites no test from our case law which determines when a convening authority must be called as a witness to explain his member selection process and decisions. *Cf. United States v. Moore, supra* (trial counsel's use of peremptory challenges). Instead appellant heavily relies on the Supreme Court decision in *Hernandez v. Texas, supra*, to argue that the convening authority should have been called as a witness by the judge in this case. He asserts that *Hernandez* requires the prosecution to produce evidence providing a race-neutral explanation for jury selection procedures when a prima facie case of racial discrimination has been established. He further asserts that a *prima facie* case is made when

> *first*, . . . the accused is in a recognizable group, *second*, . . . there is statistical underrepresentation in the jury pool, and *third*, . . . this discrimination is due to either intentional acts or a system which is by its very nature susceptible to potential abuse by intentional acts. *See also Castaneda*, 430 U.S. at 494 [97 S.Ct. at 1280]; *Batson*, 476 U.S. at 79 [106 S.Ct. at 1713].

Final Brief at 333.

In this case, it was well established at trial that appellant was black and blacks are "a recognizable group" within the meaning of *Hernandez v. Texas* and *Castaneda v. Partida*, both *supra*. *See Batson v. Kentucky, supra; Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967). Accordingly, at issue, are the remaining two prongs of appellant's *Hernandez/Castaneda* test for establishing a *prima facie* case of purposeful discrimination under the Fifth Amendment. *See generally Ramseur v. Beyer*, 983 F.2d 1215, 1226-27 (3d Cir.1992), *cert. denied*, __ U.S. __, 113 S.Ct. 2433, 124 L.Ed.2d 653 (1993)

System Susceptible to Intentional Abuse

137. The first question I will address is whether the convening authority's use of racial identifiers in the member selection process satisfied the third requirement of *Castaneda v. Partida, supra*. In other words, did evidence of that fact show a system susceptible to abuse by intentional acts of discrimination? As pointed out in the majority opinion (41 MJ at 285), the convening authority in the military justice system "is not required to be race-ignorant: he or she is only required to be race-neutral." *United States v. Green*, 37 MJ at 384. Former Chief Judge Everett in *United States v. Smith*, 27 MJ at 249, went further and opined for this Court that racial identifiers could be used by a convening authority to ensure that a "court-martial panel is representative of the military population." *See Ramseur v. Beyer*, 983 F.2d at 1228-29. Thus, the mere fact that racial identifiers were used by the convening authority or his subordinates in this unique military context did not itself show intentional discrimination. *United States v. Green*, 37 MJ at 384 ("The standards of proof and burdens of proof are set out in RCM 905(c)(1) and (2)."). *Cf. United States v. Greene*, 36 MJ at 278 (footnote omitted) ("principles of *Batson* apply to peremptory challenges . . . at courts-martial"). Nevertheless, use of racial identifiers on the jury pool selection sheets coupled with the broad discretion afforded a convening authoity in selecting court-martial panels clearly constitute a system which by its very nature is susceptible to abuse by intentional acts of discrimination. *See Castaneda v. Partida*, 430 U.S. at 497-98, 97 S.Ct. at 1281-82; *United States v. Smith*, 27 MJ at 249; *Ramseur v. Beyer*, 983 F.2d at 1227; *Johnson v. Puckett*, 929 F.2d 1067, 1072 (5th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 274, 116 L.Ed.2d 226 (1991).

Substantial Underrepresentation

138. The next question which I will address concerns the second prong of appellant's *Hernandez-Castaneda* test, *i.e.*,

whether a statistical underrepresentation was shown. Appellant in this issue asserts that "the disproportionate percentage of blacks in the jury pool as compared to the population of blacks at Fort Hood" indicates that the convening authority was racially biased. Final Brief at 332. His assigned issue, albeit indirectly, suggests that the relevant jury pool is the panel actually detailed by the convening authority to sit in this case, rather than the jury pool selection sheets from which this panel was taken.[1] In any event, appellant has not persuaded me that blacks were "substantially" underrepresented *either* in the jury pool selection sheets or in the panels actually detailed by the convening authority to sit in this case.

Statistics

As a starting point, I note that the convening authority issued four orders detailing members to appellant's court-martial. Court-Martial Convening Order (CMCO) 1 had 9 officers or 5 officers

[1] Appellant in his brief (at 334) suggests that the pool of members from which the all-white officer panel was designated by the convening authority was the 45 officers listed on the panel selection sheets submitted by the staff judge advocate to the convening authority. (R. 243) This so-called jury pool, as identified by appellant, has neither a statutory nor a regulatory origin. Pursuant to Article 25(a). Uniform Code of Military Justice, 10 USC § 825(a), all officers, commissioned and warrant, were eligible to serve on appellant's court-martial. Although the Staff Judge Advocate submitted a roster of 45 officers, the decision paper to the convening authority expressly informed the convening authority that he was not limited to the list and could designate any officer under his command in accordance with Article 25. As such, the "pool" of potential members could be the entire officer populations on Forts Hood and Sill. The officers detailed by the convening authority pursuant to written court-martial convening orders, RCM 504(d), Manual for Courts-Martial, United States, 1984, are equivalent to the civilian venire from which peremptory challenges and challenges for cause are made. A more appropriate statistical analysis would compare the percentage of black officers in the entire officer populations with the percentage of black officers detailed to serve on the court-martial.

and 4 enlisted members detailed, one of whom was black (11.1%). CMCO #4 was subsequently issued which had 12 officer members detailed, none of whom were black (0.0%). CMCO #7 had 7 officers and 6 enlisted members, 4 of the enlisted being black (30.8%). Finally, CMCO #8 detailed 12 officer members, 1 of whom was black (8.3%).

I also note that the record evidences several jury pool selection sheets used in this case. The selection sheets for CMCO #1 reflect 62 officers (13 blacks and 4 other) and 41 enlisted (13 blacks and 1 other). Appellate Exhibit (App. Ex.) LII at 9-15. The selection sheets for CMCO #4, composed only of officers, included 45 officers, 4 of whom were black (8.9%). App. Ex. XLI at 18-20. The selection sheets for CMCO #7 consisted of 282 enlisted persons and 45 officers, 327 persons total, 97 of whom were black (29.7%). App. Ex. XLVII at 3-14. Finally the selection sheets for CMCO #8, composed only of officers, was the same as that used for CMCO #4 (8.9% black). Defense statistics show that 37,998 officers and enlisted were at Fort Hood and 11,983 were black (31.5%). They also show that 425 of 2932 officers at Fort Hood were black (14.5%). App. Ex. XLI at 63.

Analysis

139. I find appellant's statistical arguments on Issue XXXI to be unpersuasive for several reasons. Initially, however, I must note that it is couched in terms of his purported Sixth Amendment right to a jury panel drawn from a representative cross-section of the population. However, as noted by former Chief Judge Everett, "No corresponding right exists ina court-martial; and, indeed, Article 25 of the Uniform Code of Military Justice, 10 USC § 825, contemplates that a court-martial panel will not be a representative cross-section of the military population." *United States v. Santiago-Davila*, 26 MJ at 389. I reject appellant's implied invitation to declare Article 25 unconstitutional.

In any event, this Court has held that a military accused does have a Fifth Amendment "equal protection right to be tried by a [panel] from which no 'cognizable racial group' has been [purposefully] excluded." 26 MJ at 389-90. *See United States v. Moore*, 28 MJ 366 (CMA 1989); *cf.: United States v. Smith*, 27 MJ at 249. Moreover, appellant has cited equal protection cases (applicable to the U.S. through the Due Process Clause of the Fifth Amendment, *see Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954)) at trial and on this appeal. *See Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954). Finally, the thrust of appellant's argument is that purposeful discrimination, not a denial of cross-representation, was evidenced in this case. In this regard, he asserts:

> The statistics show that anywhere from 15-30% of soldiers on Fort Hood were black (App. Exh. XLI), but the cross sectional pool from which the convening authority chose was only 9% black.

Final Brief at 334. Accordingly, I will construe appellant's statistical argument as a Fifth Amendment claim that the military judge erred by not requiring the convening authority to provide a race-neutral reasons for his apparent exclusion of blacks from his court-martial panel. *See Castaneda v. Partida, supra.*

140. To establish a *prima facie* case of "an equal protection violation" in a "jury selection process," a civilian accused must show *inter alia* that it

> (1) resulted in a *substantial* underrepresentation of a suspect class to which the accused belongs . . . ;

United States v. Warren, 16 F.3d 247, 252 (8th Cir.1994) (emphasis added), *citing Castaneda v. Partida*, 430 U.S. at 494, 97 S.Ct. at 1280; *see Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct.

667, 98 L.Ed. 866 (1954).[2] The burden to show a "substantial" underrepresentation is on the accused. *Whitus v. Georgia*, 385 U.S. at 550, 87 S.Ct. at 646; *United States v. Horne*, 4 F.3d 579, 588 (8th Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1121, 127 L.Ed.2d 430 (1994). Here, appellant's own figures do not show a substantial disparity between the percentage of blacks eligible for duty on his court-martial and the percentage of blacks nominated for duty from which the convening authority detailed members to his court-martial or the percentage of blacks actually detailed by the convening authority. *Cf. Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S.Ct. 617, 621, 88 L.Ed.2d 598 (1986) (appellant's own figures and analysis show exclusion not by chance).

In developing the "relevant statistical pool" for purposes of determining whether a substantial underrepresentation exists, consideration of the special skills or qualifications for service is required. *See generally Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1553-55 (11th Cir.1994). In the present case, appellant generally compares the composition of jury pool selection sheets for his detailed panel to the percentage of black officer and enlisted soldiers at Fort Hood (9% black to 15-30% black). App. Ex. XLI at 63. Such a comparison, however, ignores the fact that appellant was tried by a panel of officers at his

[2] A question arises concerning the second prong of the *Hernandez/Castaneda* test after the decision of the Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The *Castaneda* test requires a degree of underrepresentation "over a significant period of time," 430 U.S. 482, 494, 97 S.Ct. 1272, 1279, 1280, 51 L.Ed.2d 498 (1977), but *Batson* permits a showing of underrepresentation in defendant's case alone, 476 U.S. at 95-96, 106 S.Ct. at 1722-23. At least two circuits have expressly held that the *Castaneda* test has also been so modified. *Ramseur v. Beyer*, 983 F.2d 1215, 1226 (3d Cir. 1992); *Jefferson v. Morgan*, 962 F.2d 1185 (6th Cir.), *cert. denied*, __ U.S. __, 113 S.Ct. 297, 121 L.Ed.2d 221 (1992); *cf. Dobbs v. Kemp*, 809 F.2d 750, 751 (11th Cir.), *cert. denied*, 481 U.S. 1059, 107 S.Ct. 2203, 95 L.Ed.2d 858 (1987).

own request. Moreover, when he earlier requested trial by officer and enlisted members, additional jury pool selection sheets were utilized and a different detail of members made. Appellant's failure to shape his argument based on relevant and available eligible population figures seriously undermines its appeal. *United States ex rel. Barksdale v. Blackburn*, 639 F.2d 1115, 1123 (5th Cir.), *cert. denied*, 454 U.S. 1056, 102 S.Ct. 603, 70 L.Ed.2d 593 (1981); *see United States v. Douglas*, 837 F.Supp. 817, 823 n. 7 (n.D.Tex.1993); *Hillery v. Pulley*, 563 F.Supp. 1228, 1245 (E.D. Cal. 1983), *aff'd*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). *See also United States v. Greene*, 995 F.2d 793, 795 (8th Cir.1993).

141. In addition, review of the appropriate jury selection sheets used in the present case does not establish a *prima facie* case of purposeful exclusion of blacks as contended by appellant. *See also United States v. Sanchez-Lopez*, 879 F.2d 541, 547 (9th Cir.1989). Of the 62 officers considered for selection to CMCO #1, 13 were black (21%). Of the 103 officers and enlisted considered for selection on CMCO #1, 26 were black (25.2%). Of the 45 officers nominated for selection to CMCO #4 by the convening authority, 4 were black or approximately 9%. Under appellant's own figures, 15% of the total officers at Fort Hood were black. A 6% differential in terms of absolute disparity is not substantial underrepresentation as a matter of law. *United States v. Horne*, 4 F.3d at 588; *Floyd v. Garrison*, 996 F.2d 947, 950 (8th Cir.1993); *United States v. Clifford*, 640 F.2d 150, 155 (8th Cir.1980). *See generally United States v. Irurita-Ramirez*, 838 F.Supp. 1385, 1389 (C.D. Cal. 1993). *Cf. United States v. Douglas*, 837 F.Supp. at 823. Of the 327 officers and enlisted nominated for selection on CMCO #7, 97 were black or 30%. In view of appellant's own figures, 31% of total officers and enlisted at Fort Hood were black. *See* 41 MJ at 305. A 1% underrepresentation occurred in absolute disparity terms. *See United States v. Pion*, 25 F.3d 18, 22-24 (1st Cir.), *cert.*

denied, __ U.S. __, 115 S.Ct. 326, 130 L.Ed.2d 286 (1994). Accordingly, appellant's argument is not supported by the jury pool selection sheets evidenced in this case. *See generally Ramseur v. Beyer*, 983 F.2d at 1232.

Also, a statistical review of the actual detail actions taken by the convening authority do not establish or support a *prima facie* case of purposeful discrimination in the member selection process in this case. *See Hillery v. Pulley*, 563 F.Supp. at 1246. Appellant suggests that appointment of 4 black enlisted members in CMCO #7 and 1 black officer in CMCO #8 was "mere tokenism" in light of his previously detailed all-white panel of CMCO #4. He offers evidence of the belatedness of these actions to buttress his statistical showing of the convening authority's intent to discriminate in his case. *Id.* at 1246-48. I find this showing inadequate to raise a *prima facie* case of intentional racial discrimination.

142. CMCO #8, the final detail order in this case, had approximately 9% black officers which substantially corresponds to the 15% of black officers at Fort Hood. CMCO #7, the preceding detail order containing officers and enlisted, had approximately 30% blacks which corresponds to the 31% blacks at Fort Hood. No *prima facie* case is shown by an absolute disparity of 6% or 1%. *See Floyd v. Garrison, supra.*

Admittedly, CMCO #4, the second detail order in this case, had 0% black officers and a 15% disparity has borderline significance to show intentional discrimination.[3] *Ramseur v. Beyer*, 983

[3] Appellant's arguments at trial and on appeal are based on "absolute disparity" analysis (the difference between the percentage of blacks detailed to his court-martial and the percentage of blacks in the Fort Hood population). *See United States v. Pion*, 25 F.3d 18, 23 n. 5 (1st Cir.), *cert. denied*, __ U.S. __, 115 S.Ct. 326, 130 L.Ed.2d 286 (1994); *United States v. Irurita-Ramirez*, 838 F.Supp 1385, 1389 (C.D.Cal. 1993). However, the gross statistics presented by appellant at trial were rudimentary at best. Moreover, appellant did not present expert testimony explaining the statistics. *See Hillery v. Pulley*, 563 F.Supp. 1228, 1241 (E.D.Cal. 1983), *aff'd*, 733 F.2d

F.2d at 1232. However, any implication of intentional discrimination resulting from statistical underrepresentation must be evaluated in light of circumstances of a particular case. *Id.* at 1233. Here, the final panels actually detailed to this case, CMCO #7 and CMCO #8, had no substantial underrepresentation of black officers or officers and enlisted. *Id.* at 1228. Moreover, the very evidence introduced by the defense to show underrepresentation provided a race-neutral reason for the convening authority's decision on CMCO #4 (to avoid having officers exposed to pretrial publicity). *Id.* at 1229. Finally, the record shows that the panels in CMCO #7 and #8 were detailed because of appellant's request for enlisted members (#7) and his later request to return to an all officer court panel after some officers

644 (9th Cir. 1984), *aff'd*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). Even if this Court were to apply the statistical probability analysis used in *Castaneda v. Partida*, 430 U.S. 482, 496-97 n. 17, 97 S.Ct. 1272, 1281 n. 17, 51 L.Ed.2d 498 (1977), appellant has not demonstrated substantial underrepresentation.

In *Castaneda*, the Supreme Court applied a statistical probability model to determine whether the underrepresentation was random. Essentially, "if the difference betwen the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist." *Id.* at 497, 97 S.Ct. at 1282. In the case *sub judice*, applying the simple methodology used in *Castaneda*, the standard deviation is 1.2%. This figure is derived as follows: the square root of the product of the total number of officers in the sample (here 12) times the probability of selecting a black officer [(425 + 192)/(2932 + 1613) App. Ex. XLI at 63-64] (0.136) times the probability of selecting a non-black officer (0.864). *See* 430 U.S. at 497 n. 17, 97 S.Ct. at 1281 n. 17. The expected value of black officers among the 12 officers selected was approximately 2; the observed number was 1. The difference between the expected value of black officers designated to appellant's panel and the observed number of black officer designated to the panel was 1. This difference is less than two or three standard deviations and, therefore, is considered a statistically-random result. *Id.*

previously detailed became unavailable (#8). *See Ramseur v. Beyer, supra* at 1228. *Cf. Hillery v. Pulley, supra* at 1246-48.

The bottom line on this issue is that appellant did not meet his burden of estalbishing a *prima facie* case that the convening authority purposefully excluded blacks when he selected the panel members for his case. *See cf. Vasquez v. Hillery,* 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986); *Whitus v. Georiga,* 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967). Thus, the military judge did not err when he failed to call the convening authority to articular a race neutral reason for his selection decisions. *Cf. Batson v. Kentucky, supra; United States v. Moore,* 28 MJ at 369. Here, we can presume that the military judge knew that racial identifiers have been approved by our Court when used to insure a cross-representative panel for a military accused. *See United States v. Smith,* 27 MJ at 249. Moreover, appellant's statistical arguments are misleading on their face or fail on closer examination. Finally, it was conceded at trial that there was no proof that the convening authority had a history of purposeful discrimination in his court selection actions. (R. 258.) *See Ramseur v. Beyer, supra* at 1233. *Cf. Hillery v. Pulley, supra.* In this context, the military judge was not obliged by constitutional or military law to call the convening authority to explain his selection process and decisions.

ISSUE XXXII

WHETHER APPELLANT WAS DENIED HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS BECAUSE THE PANEL MEMBER SELECTION POOL DID NOT INCLUDE ANY FEMALES.

143. On appeal before this Court, appellant argues that the convening authority in this case deliberately selected a panel without woman in violation of the Fifth and Sixth Amendments.

He asserts that 11% of the soldier population at Fort Hood were women; nevertheless, he notes that none of these women were in the selection pool sheets of officers from Fort Hood; no women were in the supplemental selection pool sheets from Fort Sill; only one woman was in the selection pool sheets for officers and enlisted from Fort Hood (App. Ex. XLVII); and no women were on his detailed panel (CMCO #8). He further asserts that stacking appellant's court-martial panel with males to achieve a particular result violates this Court's holding in *United States v. McClain,* 22 MJ 124 (1986).

Turning first to appellant's Sixth Amendment argument, I find it is unsupported as a matter of law. Appellant implies that Article 25(d) is unconstitutional and that a soldier is entitled to a representative cross-section of the population in the court-martial panel which tried him. This Court resolved this issue against appellant in *United States v. Smith,* 27 MJ at 248; and *United States v. Santiago-Davila,* 26 MJ at 389. *See also United States v. Moore,* 28 MJ at 367-68 n. 3. Accordingly, the mere fact that appellant's court-martial panel had no women on it did not establish a Sixth Amendment violation.

Turning to appellant's Fifth Amendment argument, I note that its attractiveness has increased since the recent decision of the Supreme Court in *J.E.B. v. Alabama ex rel T.B.,* __ U.S. __, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). *See also Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); *Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Moreover, here, the percentage of women in the officer population of Fort Hood and Fort Sill was approximately 11% as maintained by appellant. Also, the number of women detailed was 0, suggesting an absolute disparity of eleven. At trial, however, appellant mentioned the absence of women from CMCO #4 almost as an afterthought. (R. 243, 249, 259). He then questioned the presence of a woman on CMCO #7 (R. 260) and failed to make any objection whatsoever to CMCO #8 on this basis. (R.

333-34.) *See Ramseur v. Beyer,* 983 F.2d at 1229 n. 12. In this context, I would apply a plain error analysis to this question and resolve it against appellant.[4] *Id.* at 1232 n. 18. *See generally United States v. Chandler,* 12 F.3d 1427, 1431-32 (7th Cir.1994); *Dobbs v. Kemp,* 809 F.2d 750 (11th Cir.1987).

144. My final concern is appellant's argument based on *United States v. McClain,* 22 MJ 124. I agree with Judge Gierke that there is no evidence of court-packing in this case.

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[4] Appellant's argument on appeal is based on absolute disparity analysis (the difference between the percentage of women detailed to his court-martial and the percentage of women in the Fort Hood and Sill population). *See United States v. Pion,* 25 F.3d at 23 n. 5; *United States v. Irurita-Ramirez,* 838 F.Supp. at 1389. However, the statistics presented by appellant at trial were rudimentary, at best. Moreover, appellant did not present expert testimony explaining the statistics. *See Hillery v. Pulley,* 563 F.Supp. at 1241. If this Court were to apply the statistical probability analysis used in *Castaneda v. Partida,* 430 U.S. at 496-97 n. 17, 97 S.Ct. at 1281 n. 17, appellant has not demonstrated substantial underrepresentation.

In *Castaneda*, the Supreme Court applied a statistical probability model to determine whether the underrepresentation was random. Essentially, "if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist." *Id.* at 497, 97 S.Ct. at 1282. In the case *sub judice*, applying the simple methodology used in *Castaneda*, the standard deviation is 1.1%. This figure is derived as follows: the square root of the product of the total number of officers in the sample (here 12) times the probability of selecting a female officer [312 + 169)/(2932 + 1612) App. Ex. XLI at 63-64] (0.106) times the probability of selecting a male officer (0.894). The expected value of female officers among the 12 officers selected was approximately 1; the observed number was 0. The difference between the expected value of female officers designated to appellant's panel and the observed number of female officer designated to the panel was 1. This difference is less than two or three standard deviations and, therefore, is considered a statistically-random result. *Id.*

Conclusion

Outside of the above reservations, I would affirm this case. Appellant received a fair trial and has been properly convicted. Under the Constitution and present laws of this land, I find that the death penalty has been properly adjudged and see no reason why appellant should not be executed for the crimes he commited.

I only add one further thought: my continuing concern that servicemembers be treated fairly in capital cases. As I stated in my concurring opinion in *United States v. Curtis, supra:*

> It is my personal view, however, that, in peacetime, a servicemember in a capital case should be tried by a 12-member court-martial. The value of a soldier's life is surely equal to the value of the life of his fellow citizens. *Cf. Williams v. Florida,* 399 U.S. 78, 103, 90 S.Ct. 1893, 1907, 26 L.Ed.2d 446 (1970). Nevertheless, neither the Constitution itself, nor Congress in legislation, nor the President by regulation has mandated a 12-member panel in a military capital case. *See generally* Van Loan, *The Jury, The Court-Martial,* and *The Constitution,* 57 Cornell L.Rev. 363, 384 n. 118 (1972). Moreover, it is the duty of this Court to apply the law of the land, not to legislate by judicial fiat, and therefore, it is beyond our power to mandate such a procedure. Finally, appellant himself, by use of his challenges, reduced in part the number of court members detailed to this case from 15 to 9. Moreover, he did not particularly object to trial by 9 members at this court-martial or request the detail of additional members. I could not find reversible error in these circumstances even if appellant was somehow entitled to a 12-member panel.

32 MJ at 271.

In the present case twelve members were detailed to sit in this case. Three members were challenged by the defense and one member was challenged by the prosecution. Appellant did not particularly object to trial by eight members or request detail of additional members. Thus, appellant was tried by that court-martial fairly and in accordance with the law. Its verdict must stand unless set aside by appropriate executive authority or by mandate of further judicial review.

WISS, Judge (dissenting):

145. I am not comfortable with the majority's treatment of several of the assigned issues; I believe that a more penetrating analysis would be helpful in some instances and that the discussion's focus is somewhat off the mark in others.

On three of the issues, however, I part company with the majority in two areas that relate to the bedrock for ensuring the fairness of a trial like this—a trial that ultimately may serve as the basis for executing this appellant: selection of and deliberations by court members. The first (Issue I—at 232) raises the cancerous possibility that command influence inside the members' deliberation room during their consideration of a sentence so skewed the legally required voting procedures that it undermined the fundamental fairness of those proceedings; two other issues raise the specter of the insidious possibility of racial (Issue XXXI) and gender (Issue XXXII), both at 283, discrimination infecting the convening authority's selection of the court-members who ultimately tried appellant.

The majority refuses to penetrate the protective curtain of the members' deliberations and, so, fails even to analyze much less redress the prejudice from the first flaw. As to the process by which the members who ultimately tried appellant were selected, the majority omits to consider all the facts of record surrounding that process and, so, does not recognize either the precise nature or quality of appellant's grievance.

146. As to each of these issues, therefore, I am compelled to dissent from the majority opinion. In addition, although my views of either of these matters would dispose of this appeal, I am pressed to pause and to offer substantially more comment than the majority does relating to two other issues of special importance in capital litigation: proportionality review (Issue XL—at 290) and continuity of appellate counsel (Issue LXVIII—at 298).

I

Any possibility of arbitrary imposition of rank in the military justice system—regardless of intent or motivation—that undercuts procedures that are crafted and structured to protect substantial rights of an accused must be rooted out and, if uncovered, purged. The majority consciously refuses to recognize that possibility in this case and, therefore, has covered its ears to appellant's complaint of it. I do not agree with the majority's view of the circumstances.

Accordingly, I conclude that appellant may have been denied the protections of the sentencing mechanism established by the President in RCM 1004 and 1006, Manual for Courts-Martial, United States, 1984, as well as due process in imposition of his sentence to death and his Eighth Amendment right to a reliable determination of a death sentence. I would order a limited hearing to gather all of the available evidence on the question so, on that basis, the Court could determine with confidence whether appellant's sentence was lawfully imposed.

A

147. "[T]he imposition of death by public authority is . . . profoundly different from all other penalties. . . ." *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978). The heightened concern in a capital case derives from the finality of the result and the risk that the proceedings are vulnerable

to the influence of impermissible considerations. Because of this fundamental distinction between the death penalty and other punishments, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

"[T]he Eighth Amendment requires a different treatment of death-penalty cases." *United States v. Curtis,* 32 MJ 252, 255 (CMA), *cert. denied,* __ U.S. __, 112 S.Ct. 406, 116 L.Ed.2d 354 (1991). Considerations of due process and the prohibition against cruel and unusual punishment require "fair procedure in the capital sentencing context." *Lankford v. Idaho,* 500 U.S. 110, 125, 111 S.Ct. 1723, 1732, 114 L.Ed.2d 173 (1991). One of the special requirements of the capital sentencing context is that the sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty." *Zant v. Stephens,* 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983). *Accord Blystone v. Pennsylvania,* 494 U.S. 299, 308, 110 S.Ct. 1078, 1084, 108 L.Ed.2d 255 (1990) (fundamental principle of death-penalty jurisprudence that "the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet" "a required threshold below which the death penalty cannot be imposed," *quoting McCleskey v. Kemp,* 481 U.S. 279, 305, 107 S.Ct. 1756, 1774, 95 L.Ed.2d 262 (1987)). This narrowing process may be accomplished in the trial itself or in a sentencing scheme that relies on aggravating factors. *Lowenfield v. Phelps,* 484 U.S. 231, 244-46, 108 S.Ct. 546, 554-55, 98 L.Ed.2d 568 (1988); *Proffitt v. Florida,* 428 U.S. 242, 248-50, 96 S.Ct. 2960, 2965, 49 L.Ed.2d 913 (1976); *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

148. This Court first considered whether the sentencing scheme for capital cases in the military justice system passed

constitutional muster in *United States v. Matthews,* 16 MJ 354 (1983). The Court concluded that, while the scheme did not reflect many of the then-apparent constitutionally required safeguards, one important omission was a "require[ment] that the court members make specific findings as to individualized aggravating circumstances—findings which can, in turn, be reviewed factually and legally." 16 MJ at 380. The Court suggested that either Congress or the President could lawfully remedy this defect. *Id.* at 380-81.

In response, the President promulgated a new death-penalty procedure by Executive Order No. 12,460, 49 Fed.Reg. 3169, in January 1984. That procedure became RCM 1004, Manual, *supra. United States v. Curtis,* 32 MJ at 257. *See also* Art. 106a(b) and (c), Uniform Code of Military Justice, 10 USC § 906a(b) and (c) (procedures required by Congress for imposition of death penalty for espionage in violation of Article 106a(a)).

Constitutional challenge to those procedures first arose in *United States v. Curtis,* 32 MJ 252. In the Court's opinion there, RCM 1004 was set out in full in order to plainly reveal the carefully interlocking structure of procedural safeguards that preserve a capital defendant's Fifth and Eighth Amendment rights. 32 MJ at 257-60. Making particular reference to the requirement that court "members must unanimously find at least one of the" delineated "aggravating factors" and to the requirement that the members must unanimously " 'concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances,' " *see* RCM 1004(b)(4)(C), 32 MJ at 268, the Court concluded that RCM 1004 "not only complies with due process requirements but also probably goes further than most state statutes in providing safeguards for the accused." 32 MJ at 269.

B

149. RCM 1004 (Change 2), together with RCM 1006, require the following orchestrated procedure of interrelated stepping stones toward a sentence of death:

* The accused must have been convicted of a death-authorized offense "by the concurrence of all the members of the court-martial present at the time the vote was taken." RCM 1004(a)(2).

* Ordinarily prior to arraignment, trial counsel must "give the defense written notice of which aggravating factors" listed in RCM 1004(c) "the prosecution intends to prove" as a means of narrowing the field of death-eligible accused. RCM 1004(b)(1).

* During presentence procedure, "[t]rial counsel may present evidence ... tending to establish one or more of the aggravating factors," and "[t]he accused shall be given broad latitude to present evidence in extenuation and mitigation." RCM 1004(b)(2) and (3).

* "Death may not be adjudged unless" all of the following are found by the court members based on evidence introduced either on the merits or during presentencing:

** "[A]t least one of the aggravating factors" listed elsewhere in the rule existed;

** "The required notice was given to the defense by trial counsel, and "all members concur in the finding with respect to" any given aggravating factor; and

** "All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances. . . ."

RCM 1004(b)(4) and (5).

* A vote on a proposed sentence that includes death may not occur until the members "vote by secret written ballot separately on each aggravating factor ... on which they have been instructed" and unless they unanimously agree beyond a reasonable doubt that a particular factor or factors exist in the case. RCM 1004(b)(7) and (c). Only if this threshold requirement is met is an accused death-eligible (that is, liable to imposition of the death penalty), and only then can the members proceed to deliberate and to vote on proposed sentences under the procedure applicable to all courts-martial that is set out in RCM 1006. RCM 1004(b)(7).

150. * During those deliberations, "[s]uperiority in rank shall not be used in any manner to control the independence of members in the exercise of their judgment." RCM 1006(a).

* During deliberations, "[a]ny member may propose a sentence. Each sentence shall be in writing and shall contain the complete sentence proposed. The junior member shall collect the proposed sentences and submit them to the president" of the court-martial. RCM 1006c.

* Voting is by secret written ballot. RCM 1006(d)(2).

*Voting is on "each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence

is adopted by the" necessary concurrence—in death, unanimous. RCM 1006(d)(3)(A) and (4)(A).

* The junior member of the court-martial collects and counts the votes, and the president checks the count and informs everyone else of the result. RCM 1006(d)(3)(B).

(This is not a quotation.)

Thus, compliance with RCM 1004 and 1006 attains two fundamental goals: First, it narrows the group of accused persons who can be death-eligible by requiring the members unanimously to find at least one specific aggravating factor and to find that the totality of aggravating circumstances substantially outweighs the extenuating and mitigating circumstances. Second, in consideration of what sentence should be adjudged, it implements procedures that maximize the unfettered and conscientious participation of each member in a manner that assures a moderating approach to the task and that assures that the weighty responsibilities inherent in this duty are not at all affected by differences in rank among the members.

C

151. Regrettably, the specter has been raised that this carefully designed structure of procedures broke down in this case—and critically, that it did so entirely because the superior-ranking member of the court unilaterally imposed his own short-cut toward a sentence rather than follow the clear path carefully mapped out for the court by the military judge.

As the majority opinion indicates, appellant has filed with this Court the post-trial affidavits of Colonel Ayler, who was the president of the court-martial, and Major Napoli and Captain Williams, who were two of the other members of the court-martial. I have attached all three affidavits as appendices to this opinion so that all may see exactly what these members say. *See* Appendices A, B, and C.

The majority opinion characterizes these affidavits as "ambiguous at best." 41 MJ at 235. I think they more accurately are ambiguous at *least*. All three purport to state the procedures that were followed during sentence deliberations and are in no way inconsistent with each other. Together, I believe that they, at minimum, *suggest* that the following occurred:

152. * The members did not vote at all during sentence deliberations on any of the aggravating factors relied upon by the prosecution to narrow the field of death-eligible accuseds. *See Lowenfield v. Phelps*, 484 U.S. at 244 [108 S.Ct. at 554]. Possibly, the president was content to skip that narrowing exercise and rely on the fact that they earlier had returned findings that reflected one or more such factors (*i.e.*, multiple murder, *see* RCM 1004(c)(7)(J)). RCM 1004 nowhere expressly contemplates this procedural merger of findings and sentencing votes; and the notion that the sentencing stage of a proceeding involves a deliberative process of factual and moral overtones and dynamics that is entirely distinct from the consideration of guilt would not seem to support the validity of this self-indulgence. *Cf. United States v. Shroeder*, 27 MJ 87, 90-91 (CMA 1988), *cert. denied*, 489 U.S. 1012, 109 S.Ct. 1121, 103 L.Ed.2d 184 (1989). In any event, for whatever reason, this vote was not taken, as the military judge had directed them to do as part of the carefully interlocking procedural structure.

* There was no vote at all on whether the aggravating circumstances outweighed the extenuating and mitigating circumstances—at least, none of the three affidavits, which otherwise appear to fully set out the procedure that was followed, even mentions this critical step.

* Rather than the members formally writing proposed sentences in their entirety, the president had them proceed directly to a vote between the "two options" of life imprisonment and death. There is no mention of the remaining elements of the sentence at that point; and this method of choosing between the two statutorily authorized "options" theoretically begs the question whether any member would propose death under correct procedures.

* Rather then the junior member collecting and counting the ballots, the junior member instead merely passed the folded pieces of paper to the president, who himself unfolded and tallied them—another shortcut through the procedural checks in the rules. This first vote was 7 for death and 1 for life.

153. * Even if this first "vote" could somehow be constructed under the rules as a written proposal of sentences to be considered, the members did not then proceed, as required, to vote on the lightest sentence "option" first—life. *See United States v. Johnson*, 18 USCMA 436, 40 CMR 148 (1989); *United States v. Jackson*, 34 MJ 1145, 1149 (ACMR 1992); *see also United States v. Fisher*, 21 MJ 327 (CMA 1986) (failure to instruct members to vote on the proposed sentences "begining with the lightest"). Instead, they took a second vote between the "options" of life imprisonment and death, thereby making them equally available alternatives at that point in time. Where only one vote for life imprisonment is necessary to thwart a death sentence, the requirement for distinct votes—beginning with life, proceeding to death, then over again if the required concurrence is not mustered at any

point—cannot reasonably be seen as a mere technicality. Again there is no mention about consideration of the other elements of the sentence.

* As before, contrary to the military judge's instructions, the junior member merely collected and passed to the president the folded pieces of paper, who himself unfolded and counted them. He announced that, this time, the vote was all 8 for death, bad-conduct [sic] discharge, total forfeitures, and reduction to E-1.

(This is not a quotation.)

154. RCM 1004 and 1006 require a careful voting process: first, to determine if an accused is eligible for a death sentence (i.e. commission of a capital offense, presence of one aggravating factor, and aggravating circumstances); and, second to determine whether death is the appropriate sentence (after voting on and rejecting all lesser proposed sentences). These procedures are essential to ensure that the death penalty is not inflicted in an arbitrary and capricious manner.

As the earlier comparison graphically demonstrates, if the members actually trampled along the procedural shortcuts that are suggested by the affidavits, in the process they crushed the thoughtful and delicate balance in the procedural structure mandated by RCM 1004 and 1006. Moreover, if these shortcuts occurred, they occurred as a result of the unilateral imposition by the senior-ranking member of the court-martial of a procedure that differed markedly from the procedure that was plotted for the panel in the military judge's painstaking instructions.

Assuredly, the senior-ranking member of the court-martial has the responsibility to preside in the fullest sense. I do not quarrel with the majority that "Colonel Aylor was the president of the court-martial and, as such, had certain adminstrative duties and discretion in the performance of those duties." 41 MJ at 237.

See United States v. Accordino, 20 MJ 102, 105 (CMA 1985). It is not within his authority or discretion, however, to divine his own personally preferred procedural path toward a death sentence, in substantial disregard of the one that has been clearly prescribed by the President of the United States in the Manual for Courts-Martial and, in some instances, in substantial disregard as well of checkpoints along the way that are required by the Fifth and Eighth Amendments.

155. Unlawful command influence? I think so. These affidavits seem to suggest much more than what the majority concludes was "no more than Colonel Aylor's proper exercise of authority as president to preside over the deliberations." 41 MJ at 238. Instead, they seem to portray a scenario in which the senior-ranking member, solely by virtue of his rank, successfully imposed a procedure that was unlawful and that, in the process, destroyed the lawful procedural structure that would have substantially assured a fair and reliable sentence. By any definition, that scenario is unlawful command influence.[1] *Cf. United States*

[1] The majority contends that no issue of unlawful command influence is before this Court because "[t]here is absolutely no suggestion in the affidavits that Colonel Aylor exercised unlawful command influence." 41 MJ at 238. Defiantly denying the true color of the cloud created by these affidavits, however, does nothing to alter their dreary tone. To prove the point, I simply pose this question: Can it be more than rhetorical to ask whether anyone except the most senior ranking person on the court could have unilaterally imposed on all of the other, presumably intelligent, officer members a procedure of his own handiwork that was in marked deviation from that which clearly and in detail was prescribed by the military judge? I am not so naive as to believe that a second lieutenant (or a chief warrant officer 3, the rank of the junior member on appellant's panel) could have been so possessed of natural leadership that he so effectively could have led astray a whole panel of his colleagues. I am reminded of Justice Felix Frankfurter's admonition, "And there comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52, 69 S.Ct. 1347, 1349, 93 L.Ed. 1801 (1949). Secure in the assumption that a junior-grade officer could not have accomplished what this colonel did, and in light of the fact that the procedure devised by Colonel Aylor in several important respects was at odds with the carefully crafted procedure mandated by the President of the United States, how can Colonel Aylor's role in this transgression be described as anything but "unlawful command influence"?

I am especially perplexed by the vote and separate comments of Chief Judge Sullivan on this issue. By himself, the Chief Judge merely seems to agree with the majority's view that these affidavits—which I believe raise the possibility that the influence of rank was used to implement unlawful procedures in lieu of those that were carefully constructed to protect an accused's substantive and procedural due process rights—simply does not present an issue of unlawful command influence. I confess, however, that I am unable to reconcile this view with the Chief Judge's separate opinion in *United States v. Greene*, 41 MJ 57, 59 (CMA 1994)—a case in which he forthrightly recognized that failure to follow important voting procedures in the deliberation room opens the door to unlawful command influence during those deliberations.

v. Accordino, *supra* at 104 ("use of rank by a court member to pervert military justice"); *United States v. Carr*, 18 MJ 297, 302 (CMA 1984) ("unlawful command influence" exception to Mil.R.Evid. 606(b), Manual, *supra*, includes allegation that court-martial's president used rank to pressure other members during deliberations).

The majority attempts to sidestep this command influence issue by stating, "Appellant has not alleged that Colonel Aylor exercised unlawful command influence during the deliberations." 41 MJ at 237. Although appellant did not make this claim in the brief, appellate defense counsel at oral argument repeatedly raised and argued the command influence issue. At the very outset of oral argument, counsel argued that the voting procedures were designed to prevent command influence and urged that the affidavits permit an inference of command influence. Again in rebuttal argument, appellate defense counsel explicitly asserted that the issue of command influence justified an evidentiary hearing. Accordingly, there can be no dispute that the command influence issue is squarely before this Court.

Nothing reeks like the odor of unlawful command influence; these affidavits have a distinctly disconcerting aroma emnating from them. I cannot legally or morally join in affirming this sentence to death without further proceedings to assure myself, appellant, and the community as a whole that appellant's substantial rights were not critically undermined by the unlawful exercise of the power of rank behind the closed doors of the members' deliberations. *See* Mil.R.Evid. 606(b).

II

156. Through Issues XXXI and XXXII, appellant pursues his trial assault on the court-martial panel-selection process that he complains resulted in African-Americans and women unlawfully being excluded initially and underrepresented ultimately on the panel that tried him. The majority opinion attempts to minimize the absence of both racial and sexual diversity in *one* officer panel that appellant objected to trying him. The majority relies on the post-objection attempts of the convening authority to provide for some diversity as sufficient damage control to moot this issue. I do not agree with the majority's casting of this issue, and I do not agree, either, with its conclusion that appellant has not carried the appropriate burden to trigger further inquiry.

A

Appellant is an African-American male who faced charges of murder, attempted murder, and robbery. His murder victims were two white males, and the victim of his attempted murder also was a white male; all of his alleged robbery victims were white males and females; and one of the important prosecution witnesses was a married white woman with whom appellant was involved in a sexual affair at the time of his crimes and upon whom appellant in his defense attempted to place a good deal of the onus for his actions.

157. Understandably, then, the defense team in this capital case had heightened sensitivity to any possible injection of racial discrimination into the proceedings. Certainly, a principle focus of this sensitivity, as well as to a somewhat lesser extent to gender discrimination,[2] related to the composition of the court-martial panel. In order to fully evaluate the legal issues inherent in appellant's complaint, a rather extensive recitation is necessary relating to the evolution of the panel that finally tried appellant.

Court-Marial Convening Order Numbers 1 and 4

The first panel of officers was selected under Court-Martial Convening Order (CMCO) #1, dated January 20, 1989. The senior member of this panel was African-American, and the rest were Caucasian; none was a woman. Appellate Exhibit (App. Ex.) LII at 9.

In a memorandum to the convening authority of February 14, the staff judge advocate (SJA) pointed to the substantial local publicity surrounding the offenses and the upcoming trial; "[i]n order to insure a completely fair and impartial court-martial panel," he recommended that the convening authority "detail, for this case only, a panel composed of soldiers who arrived at Fort Hood on or after 1 January 1989, or who are presently assigned to commands outside Fort Hood."

158. The SJA attached to his memorandum a list of officers nominated by the various commands at Fort Hood and officers made available from Fort Sill. Of the 45 officers on the list, 41 were white and 4 were African-American; none was female. The

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[2] Counsel's less-intensive focus on apparent unlawful exclusion of women from the court-martial panel is understandable in light of the absence of any authoritative caselaw at that time that definitively put gender discrimination in this context on a par of unlawfulness with racial discrimination. Only recently has the Supreme Court held that the former is as legally reprehensible as the latter. *See J.E.B. v. Alabama ex rel. T.B.*, __ U.S. __, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

SJA recommended that the convening authority "select 12 officers to serve as court members," who "should be designated by placing numbers 1 thru 12 next to their names." Additionally, he recommended that the convening authority "select 15 officers to serve on the above panel" as alternates in the event that "approved absences or challenges cause the number of members available to fall below prescribed limits." These alternates, he suggested, "should be designated by placing numbers 13 thru 27 to signify the order in which they should serve on the court-martial panel."

The member-selection list given to the convening authority contained each officer's name, rank, social security number, unit, race, and sex, as well as a blank line on the left margin next to each nominee's name for the convening authority to indicate his selections. Every one of the nominees next to which the convening authority placed numbers 1 through 12 was a white male. Of the 15 officers next to whom he placed numbers 13 through 27, two were African-American: Major Taylor was numbered 14, and Major Staples was numbered 17.

159. Implementing the SJA's recommendation and the convening authority's selections, the latter promulgated CMCO #4 on February 14. Through this order, the convening authority withdrew appellant's case from a racially mixed court-martial panel of all men (CMCO #1) and referred it to an all-white, all-male panel of 12 officers. App. Ex. XLI at 18-20.

Court-Martial Convening Order
Numbers 7 and 8

On February 21, at a session convened under Article 39(a) UCMJ, 10 USC § 839(a), defense counsel highlighted the fact that all 12 of the panel members were white males. In that light, he expressed concern that the only information on the selection sheets—other than innocuous data of names, ranks, social security numbers, and units—was racial and gender identifiers. Based on the uniform composition of the panel and on the nearly uniform composition of the list of nominees from which the convening authority selected the panel—made further suspect by the pointed inclusion of the racial and gender identifiers on the selection sheets—counsel advised that the defense "would probably have a motion" relating to the lawfulness of the selection process, both as to "he people given to the Generral to select" and as to "the people selected by the General."

At the same session, appellant requested enlisted members on his panel. Defense counsel made clear at the time that his client felt compelled to make such a request in the hope of getting a better cross-representation,[3] that the request was not the result of any real desire by appellant for enlisted members; and that the defense felt that the only way they could learn the race and gender of the enlisted members that the convening authority would appoint would be to request such members. He indicated, however, that appellant might well withdraw that request later and that, in any event, appellant was entitled to a lawfully selected officer panel, without regard to whether appellant did or did not want enlisted members.

160. The next day, on February 22, the convening authority

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[3] It might be argued that counsel's use of such phrases as better cross-representation and cross-section of the community sounds like an objection lodged under the Sixth Amendment right to trial by a jury of peers, which is inapplicable to courts-martial, rather one under the Fifth Amendment rights to equal protection and due process, which are applicable. *See United States v. Santiago-Davila*. 26 MJ 380, 389-90 (CMA 1988). It was abundantly clear, however, both in defense counsel's written motion and brief and in his advocacy in the courtroom that appellant's objection to the selection process included the Fifth Amendment grounds. In any event, even if counsel's bases had not been so clear, I would be unwilling to invoke waiver under these circumstances. Addressing such a possibility in *Santiago-Davila* the Court declined "to apply the doctrine of waiver so strictly—especially when we are dealing with a fundamental constitutional right not to be the victim of purposeful racial discrimination and when the defense has asserted a closely-related constitutional claim." *Id.* at 390.

provided 6 enlisted members. This action later was effected by CMCO #7, published on March 24, in which the convening authority relieved 5 of the original white male members: COL. Webb, LTC Hardie, MAJ Napoli, CPT Williams, and CW3 Hasenhauer—numbered 1, 4, 9, 10, and 11 on the member-selection listt. App. Ex. XLI at 18-20. In their stead, the convening authority detailed six enlisted members, three of whom were African-American males and one of whom was an African-American female (the other two were white males). The selection sheets used for this panel (App. Ex. XLVII at 3-14), like those in use for the panel detailed under CMCO #4 (App. Ex. XLI at 18-20), contained racial and gender identifiers.

True to his promise of February 21, defense counsel submitted a written motion on March 13 that was captioned, "MOTION FOR APPROPRIATE RELIEF: CHALLENGE TO VALIDITY OF REFERRAL DUE TO ERRORS IN PANEL SELECTION PROCESS." Therein, counsel claimed that "the process for selection of panel members in this case has resulted in a violation of the accused's right to Due Process and Equal Protection under the Fifth Amendment." App. Ex. XLI at 1. He relied principally on such cases as *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); and *United States v. Smith*, 27 MJ 242 (CMA 1988). Counsel's brief made clear that the "scope" of the requested

> inquiry is broad. It should involve every aspect of the panel selection and referral process, to include both the persons selected for duty and the nominees not selected, the staffing of the action, the decisionmaking process of the convening authority, the population from which the selection was made, and the personal attitudes and motivations of the people involved in the selection process. . . .

161. Counsel acknowledged in his brief that the defense had the burden to make a *"prima facie"* showing of denial of equal protection "in order to shift the burden to the Government to disprove" that showing. *Casteneda v. Partida, supra* 430 U.S. at 495, 97 S.Ct. at 1280. Thereafter, at some length, the defense sought to make this *prima facie* case by showing: 1) that "the defendant is a member of a recognizable group singled out for different treatment," *citing Hernandez v. Texas*, 347 U.S. 475, 478-79, 74 S.Ct. 667, 670-71, 98 L.Ed. 866 (1954); 2) that there is "underrepresentation of his group on the panel" by making statistical comparisons of the numbers of African-Americans and women on the panel with the numbers among the local military population; and 3) that "the underrepresentation may be due to unconstitutional activity." App. Ex. XLI at 5.

After extensive argument on these points, counsel then urged that, the *prima facie* showing having been made, "[t]he Government has the burden of proof to 'explain adequately the racial exclusion.' *Batson*, 476 U.S. at 94 [106 S.Ct. at 1721]." Ultimately, counsel urged that the remedy requested was for the military judge to "strike down the referral of this case as violative of the accused's right to Due Process and Equal Protection under the Fifth Amendment . . . and return the case to the convening authority. The defense also requests the military judge strictly scrutinize all actions by the command with regard to this trial in light of the developments in this case."

While discussing this motion at an Article 39(a) session, defense counsel reiterated that their earlier request for enlisted members had been conditional and with the express understanding that it might be withdrawn later. Counsel explained that the request was an effort to try to get "a more representative panel" than the "all-white, all-male panel" of officers detailed under CMCO #4. When the military judge queried whether the convening authority had not done exactly what appellant wanted—that is, given him members of his race on the panel in the form of

enlisted membership—the defense responded:

> [W]e feel like we shouldn't have to be made to make some kind of election, in order to try and get a panel that's not in violation of the Equal Protection Act [sic]—it puts an unnecessary burden on the defense. We'd like to have the problem with the officer panel solved, before—instead of putting the burden on us, to cure the Government's error, in this case. And, all we're saying is that they—that it's up to them to rebut; they need to present evidence to rebut this prima facie case. . . .

162. On March 23, the military judge denied appellant's motion for a new officer panel. He explained his decision as follows:

> In my view, there aren't any factual issues to be resolved. There is no per se right to have minority representation on a court-martial panel. None of the officer court members listed on the convening order is black. Numerous black enlisted soldiers have been designated to sit. The accused, initially, as I understand, elected to be tried by a panel of officers and enlisted soldiers. Now, I've been told, however, that that's not the case; that the accused wishes to be tried by officer-members only. Black officers have been designated as alternate court members. The pool of officers from which to choose was somewhat limited, in that the Convening Authority, in this case, wanted individuals arriving at Fort Hood after 1 January 1989, and officers nominated from Fort Sill, Oklahoma. This was done to allay defense concerns about pretrial publicity. Because of these self-imposed limitations, the number of black officers from which to choose shrank significantly. I agree with the trial counsel that, consequently, presenting demographic statistics for all of Fort Hood and the racial breakdown of officer/enlisted members becomes somewhat irrelevant. Other than raw statistics, the defense has not presented evidence or made offers of proof to cause me to conclude that blacks have been arbitrarily excluded from the officer-panel selection process, or that the Convening Authority was racially-biased in his selection process. The defense has conceded that, in the past, this Convening Authority has appointed senior and junior black officers to sit on panels. In reviewing the documents concerning the selection of enlisted soldiers, it is clear that the Convening Authority had a far greater pool of minority soldiers from which to choose. He chose several black enlisted soldiers to sit on this panel. Again, earlier in the trial, the accused indicated that he wished to be tried by officers and enlisted—that's not now the case—but, the fact that several black NCOs were selected to sit, by the Convening Authority, is strong circumstantial evidence, in my view, that the selection of the officer panel was done without racial animus and without any sinister motives. If the Convening Authority was trying to manipulate the system, surely black NCOs or black enlisted soldiers would have also been excluded. The Convening Authority—or, the selection of the officer-panel members was done in accordance with law and regulation. The selection process violated none of the rights of the accused.

On March 23, appellant formally withdrew his request for enlisted members and asked for an all-officer panel. By memorandum dated March 24, the SJA recommended that the convening authority "appoint an additional 5 officers to the 7 previously selected to sit as court members in this case [CMCO #7]." He advised the convening authority that those 5 could be 1) the

same 5 earlier relieved when appellant had "requested enlisted members"; 2) "[t]he next 5 alternate officer members previously selected"; or 3) "[a]ny other alternate officer member previously selected or any officer of your command who, in your opinion, meets the requirements of Article 25. . . ." The SJA furnished the convening authority with member-selection sheets that contained all of the officers on the prior selection sheet including the seven who remained on the panel pursuant to CMCO #7.

163. The same day, the convening authority published CMCO #8 by which he relieved the six enlisted members and detailed five additional officers. Of these, three had been among the five officers relieved when appellant had requested enlisted members: MAJ Napoli, CPT Williams, and CW3 Hasenhauer. The other two who had been relieved—COL Webb and LTC Hardie—in the meantime had undertaken conflicting obligations that they were unable to reconcile on such "short notice."

The two new faces were MAJ Staples, an African-American male who had been numbered 17 on the original selection sheet, and LTC Dobbs, a white male who had been numbered 16 on that sheet. There is no explanation why the convening authority skipped over the officers that earlier he had numbered 13, 14 (MAJ Taylor, an African-American male), or 15; this, notwithstanding the SJA's advice in his memorandum accompanying the original selection sheet that the convening authority should number his selections for alternates "13 thru 27 to signify the *order in which they should serve* on the court-martial panel" if needed. (Emphasis added.)

Ultimately, then, the final panel selected (CMCO #8) by the convening authority consisted of 11 white male officers and 1 African-American male officer; of the 5 alternates, 2 were African-American males, and none was a woman. App. Ex. LXVIII at 1-3. The single African-American detailed as a primary member was not challenged and did sit as one of the eight members who convicted and sentenced appellant to death.

B

Constitutional Chracter of Appellant's Complaint

164. In the recent opinion of the Supreme Court in *J.E.B. v. Alabama ex rel. T.B.*, — U.S. —, —, 114 S.Ct. 1419, 1421, 128 L.Ed.2d 89 (1994), Justice Blackmun began the Opinion of the Court as follows:

> In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), this Court held that the Equal Protection Clause of the Fourteenth Amendment governs the exercise of peremptory challenges by a prosecutor in a criminal trial. The Court explained that *although a defendant has "no right to a 'petit jury composed in whole or in part of persons of his own race,' " id.* at 86, 106 S.Ct., at 1717, quoting *Strauder v. West Virginia*, 100 U.S. 303, 305, 25 L.Ed. 664 (1880), *the "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." Id.*, 476 U.S. at 85-86, 106 S.Ct. at 1717. Since *Batson*, we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory. We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice. *See Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); *Georgia v. McCollum*, 505 U.S. —, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).

(Emphasis added.) This what appellant's complaint is all about;

and the majority's attempt to gloss over this constitutional argument is unpersuasive.

The majority's truncated treatment of appellant's constitutional challenge implicity relies upon three, stepped, fall-back positions: 1) Because a military accused is not entitled constitutionally to a trial by his peers, *Batson* and *J.E.B.* somehow apply differently to racial and gender discrimination in courts-martial than they do in civilian trials; 2) even if they do apply fully to courts-martial, they apply only to such discrimination as it is manifest in peremptory challenges in the courtroom, not to the same discrimination that might be manifest at other stages in the jury-selection process; and 3) even if they apply to courts-martial and even if they apply to the entirety of the jury-selection process, Article 25, UCMJ, 10 USC § 825, somehow permits different application to the stage of the process at which the convening authority selects the members. Each of these arguments may be quickly joined and rejected.

165. First, appellant's lack of a right to be tried by a jury of his peers does not translate into lack of a right to have the factfinders selected without regard to racial or gender stereotypes. In *United States v. Santiago-Davila,* 26 MJ 380 (CMA 1988), this Court foursquare applied *Batson's* constitutional veto of racial discrimination against civilian jurors to identical discrimination against members of courts-martial. We reaffirmed that unwavering commitment as recently as last term in *United States v. Greene,* 36 MJ 274 (CMA 1993). I assume that the majority does not intend to sound retreat from those cases, but I cannot reconcile the majority opinion here with them.

Second, the majority cannot escape the inescapable by any hint that *Batson's* conditional sword is unsheathed only in the courtroom and only to protect against litigants' challenges. The Supreme Court long ago recognized the extended swath cut by such a sword in search of stereotype class discrimination in *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690

(1975), where the Court struck down a gender-discriminatory jury registration requirement as a violation of the Sixth Amendment. In *J.E.B. v. Alabama, supra,* the Court made clear that while "*Taylor* relied on Sixth Amendment principles, . . . the opinion's approach is consistent with the heightened equal protection scrutiny afforded gender-based classifications." — U.S. at —, 114 S.Ct. at 1424. Indeed, the *Batson* Court itself made specific reference to examination of the various stages of the selection process in search of unlawful discrimination. 476 U.S. at 87-88, 106 S.Ct. at 1718.

Finally, the majority cannot scramble for refuge behind the shield of Article 25 in order to insulate the member-selection process and to isolate application of *Batson* and *J.E.B.* to peremptory challenges. This statute, without any parallel in civilian justice systems, permits the convening authority to handpick members for a court-martial panel who are "best qualified for the duty," Art. 25(d)(2), from among those "eligible" to serve, *see* Art. 25(a), (b), (c)(1), and (d)(1). Even in the context of such unique power of subjective discretion, however, I would think it would be clear from *Batson* and *J.E.B.* (but perhaps it needs to be bluntly asserted); "White male" is not a proxy for "best qualified," either constitutionally or logically. It is precisely such short-hand equation of group stereotypes with competence that the Supreme Court rebuked in *Batson* and *J.E.B.*

166. Accordingly, it should be clear from these cases that racial and gtender discrimination at any stage of the selection process violates the Fifth Amendment. The majority's slight-of-hand that seeks to divert attention by calling such perniciousness "court stacking" changes nothing.[4] "Court stacking" discrimination on the basis of race or gender violates not only Ar-

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[4] The implicit diminution of the seriousness of the discrimination by calling it simply "court stacking" is akin to an argument addressed by the Su-

ticle 25, but also the Fifth Amendment. Changing the name of the evil changes neither the nature of the evil, the standards and the burdens for measuring it, nor its constitutionally required remedy. Fifth Amendment law applies here,[5] not Article 25 law.

Invoking the Right: Who Does What and When

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preme Court in *J.E.B. V. Alabama,* — U.S. at — n. 14, 114, S.Ct. at 1428 n. 14:

> The popular refrain is that *all* peremptory challenges are based on stereotypes of some kind, expressing various intuitive and frequently erroneous biases. But where peremptory challenges are made on the basis of group characteristics other than race or gender (like occupation, for example), they do not reinforce the same stereotypes about the group's competence or predispositions that have been used to prevent them from voting, participating on juries, pursuing their chosen professions, or otherwise contributing to civic life. *See* B. Babcock, A Place in the Palladium, Women's KRights and Jury Service, 61 U.Cinn.L.Rev. 1139, 1173 (1993).

(Citation omittted.)

[5] In *Davis v. United States,* — U.S. —, — n. *, 114 KLS.Ct. 2390, 2354 n.*, 129 L.Ed.2d 362 (1994), the Supreme Court noted that it "never had occasion to consider whether the Fifth Amendment privilege against self incrimination, or the attendant rights to counsel during custodial interrogation, applies of its own force to the military. . . ." Noting that the President through the Manual for Courts-Martial and the Court through its opinions has fully applied the Supreme Court's cases in that area to courts-martial, the Court "proceed[ed] on the assumption" that its cases applied "to courts-martial just as they apply to state and federal criminal prosecutions." Similarly, as to the Fifth Amendment provisions that protect against racial and gender discrimination in jury selection, this Court in *Santiago-Davila* and *Greene* has fully applied Supreme Court cases to courts-martial. Unless and until the majority of this Court forthrightly holds otherwise, then, and in the absence of any indication from the Supreme Court to the contrary, I will proceed on the basis of our precedent that fully applies this Fifth Amendment protection to courts-martial.

Prior to the *Batson* decision, a criminal defendant who complained of denial of equal protection from racially discriminatory exclusion of jurors had to prove systematic exclusion of members of a certain race. *See Batson v. Kentucky,* 476 U.S. at 82 n. 1, 106 S.Ct. at 1715 n. 1; *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 18 L.Ed.2d 759 (1965). A defendant seeking to do so was faced with a presumption, otherwise, that no such purposeful exclusion had occurred. *Id.* at 221-22, 85 S.Ct. at 836-37. Over time, lower Federal courts "reasoned that proof of repeated striking of [members of a particular race] over a number of cases was necessary to establish a violation of the Equal Protection Clause." *Batson v. Kentucky,* 476 U.S. at 92, 106 S.Ct. at 1720.

The *Batson* Court, however, "reject[ed] this evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." 476 U.S. at 93, 106 S.Ct. at 1721. While the defendant continues to carrry the burden of persuasion on the issue, now "[c]ircumstantial evidence of invidious intent may include proof of disproportionate impact." 476, U.S. at 93, 106 S.Ct. at 1721. The "totality of the relevant facts" may give "rise to an inference" of purposeful discrimination sufficient to make the required *prima facie* showing. 476 U.S. at 94, 106 S.Ct. at 1721. One recognized means of doing so is to prove "that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination.' " 476 U.S. at 95, 106 S.Ct. at 1722. In short, to carry the burden of persuasion successfully, a complaining defendant need not show systemic discrimination over time but may rely, instead, on facts relating to the selection of jurors solely in *his* case.

167. Once a defendant makes a *prima facie* showing of purposeful discrimination based on the totality of the circumstances,

the Government is required to come forward and articulate a neutral explanation for its actions relating to the particular case then at trial. Mere denial of "discriminatory motive" or assurance of "good faith" will not suffice. 476 U.S. at 98, 106 S.Ct. at 1723-24. Thereafter, the judge has "the duty to determine if the defendant has established purposeful discrimination." 476 U.S. at 98, 106 S.Ct. at 1724. This finding concerning discrimination is one of fact. 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 n. 21.

The Court in *J.E.B.* made clear that resolution of a claimed discrimination by gender follows the same process. Justice Blackmun explained:

> As with race-based *Batson* claims, a party alleging gender discrimination must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723. When an explanation is required, it need not rise to the level of a "for cause" challenge; rather, it merely must be based on a juror characteristic other than gender, and the proffered explanation may not be pretextual. *See Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

—U.S. at — - —, 114 S. Ct. at 1429-30.

C

At the outset of considering how the events leading to selection of appellant's court-martial panel measure against the legal principles just set forth, I should plainly state that the issue as I see it is not whether the convening authority did in fact violate appellant's Fifth Amendment right to equal protection; rather, it is whether the military judge correctly analyzed and disposed of

appellant's claims under *Batson* and *J.E.B.* that the convening authority did so.

In several respects, I believe that the military judge did not. In discussing appellant's claims and the military judge's response to them, I will follow the analytical construct of *Batson, J.E.B.*, and *Greene*, 36 MJ at 278 n.2.

Step 1: Prima Facie Showing of Purposeful Discrimination

168. Appellant met his initial burden of making a *prima facie* showing of purposeful discrimination in selection of the court members. Actually, he did so as to three distinct Fifth Amendment violations.

First, when the convening authority withdrew appellant's case from the racially mixed panel of members detailed in CMCO #1 and referred it to the all-white panel of members in CMCO #4, and when the defense complained of this, there was a *prima facie* showing of a *Batson* violation. This Court stated in *United States v. Greene*, 36 MJ at 278, that a *prima facie* showing is made "when a trial counsel exercises a peremptory challenge to exclude 'a member of a congnizable racial group,' 476 U.S. at 96, 106 S.Ct. at 1723, from membership on a court-martial and the challenged member is also of the same race as the accused." I fully agree with the practical view of the world expressed by Judge Cox in his separate opinion in *United States v. Carter*, 25 MJ 471, 478 (CMA 1988), that the convening authority's decision not to choose some of the nominees for court-martial service is "the functional equivalent of an unlimited number of peremptory challenges." Thus, when the convening authority withdrew appellant's case from a racially mixed panel and referred it to an all-white panel, his action was akin to a prosecutor exercising peremptory challenges against the members of the racially-mixed panel. That is enough, under *Greene*, to establish a *prima facie* showing of purposeful discrimination which, in turn, triggers the Government's responsibility to offer a race-neutral explanation.

Second, appellant demonstrated "that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing 'the opportunity for discrimination.' " *Batson v. Kentucky*, 476 U.S. at 95, 106 S.Ct. at 1722. Of the list of 45 officer nominees sent to the convening authority from which he selected the members subsequently detailed on CMCO #4, only 4 were African-American (less than 9%). From this list, the convening authority selected 12 officers as members; none was African-American (0%). These figures compare adversely to the statistical data furnished by the defense relative to the African-American officer population at Fort Hood (15%) and at Fort Sill (12%), App. Ex. XLI at 63 (Hood), at 64 (Sill).

169. I recognize that the convening authority also selected 15 other officers as alternates, of which 2 were African-American (13%). App. Ex. XLI at 18-20. Of course, selection of alternates—*possible* members of the court-martial—conceptually does nothing to vitiate the prima facie case of discrimination in choosing the *actual* members. This conclusion has real force, as well, given the practical unlikelihood that, in the absence of some unforeseen circumstance, any alternate actually would be detailed when there were 12 primary members.

Related to use of alternates, one other matter is worth at least momentary pause. Interestingly, in this case, the SJA appeared to suggest early-on a mechanism for determining which alternates would be detailed as members if ever they were needed (by recommending that the convening authority, in selecting members for CMCO #4, number the alternates 13 through 27 "to signify the order in which they should serve on the court-martial panel"), and the convening authority apparently accepted that recommendation. Nonetheless, the moment that the opportunity actually arose to detail alternates, the convening authority abandoned that mechanism without so much as a tip of his hat—detailing numbers 16 and 17, rather than 13 and 14.

Appellant having shown statistical underrepresentation of

African-Americans during the selection process, the second prong required of this showing scarcely can be disputed: The members were "selected under a practice providing 'the opportunity for discrimination.' " *Batson v. Kentucky*, 476 U.S. at 95, 106 S.Ct. at 1722. Members of the convening authority's subordinate commands were entirely free to nominate any officer for selection that they deemed appropriate, their discretion being fettered only by Article 25. As to the selection by the convening authority, this Court often has acknowledged the convening authority's sole discretion in this regard under Article 25. *See, e.g., United States v. Greene*, 20 USCMA 232, 238, 43 CMR 72, 78 (1970). *Cf. Castaneda v. Partida, supra* ("key-man" system for selecting grand jury members—where state judge chose commissioners who, in turn, selected prospective grand jurors based on certain statutory criteria such as citizenship, literacy, sound mind, moral character, and lack of criminal record, 430 U.S. at 484-85, 97 S.Ct. at 1275—was "highly subjective" since commissioners used own discretion and was susceptible of abuse since Hispanic surnames were obvious from the jury rolls). 430 U.S. at 497, 97 S.Ct. at 1281.

170. Just as surely as it is within a prosecutor's private and sole discretion to decide whom to challenge peremptorily, so is it within a commander's discretion who to nominate and within a convening authority's discretion whom to select. Equally, the authority is subject to abuse. Thus, just as surely as a prosecutor's peremptory challenge triggers a duty to explain when proper objection is made, a similar duty arises in the face of substantial underrepresentation of a race or gender among the nominees or selectees. Neither the fact that Article 25 states neutral selection criteria nor any "presumption that the officials discharged their sworn duties" will rebut a *prima facie* case of discrimination. *See Castaneda v. Partida*, 430 U.S. at 498 n. 19, 97 S.Ct. at 1282 n. 19.

Further, in this case, the only personal information on the nomi-

nees reflected on the nomination sheets were their race and gender. While such identifiers in themselves may not constitute an evil, see *United States v. Green*, 37 MJ 380 (CMA 1993), their pointed inclusion here certainly heightened " 'the opportunity for discrimination.' " *See Castaneda v. Partida, supra.*

The third distinct *prima facie* showing of a Fifth Amendment violation concerns exclusion of women. *No* woman was on the officer panel in CMCO #1; *no* woman was on the officer panel in CMCO #4; only 1 woman was on the enlisted group detailed to the panel in CMCO #7; and, once appellant withdrew his request for enlisted members which occasioned relieving that sole woman and detailing additional officers, *no* woman was on the panel ultimately detailed to try appellant. Overlaying the preceding analysis on these facts, surely a *prima facie* case of gender discrimination was made: The female gender statistically was grossly underrepresented, and the members were selected under a system that provided "opportunity for discrimination." That is all that is required by *J.E.B.*

171. Finally, regarding appellant's *prima facie* showing of discrimination, I am unrpersuaded by the majority's reliance on the convening authority's post-objection action of detailing African-Americans and one woman as enlisted members. The heterogeneity of the enlisted representation on the panel is in stark contrast to homogenous officer representation on this same panel. This contrast between the officer and enlisted communities of the panel only raises more questions than it answers about the circumstances of detailing members in this case and, if anything, supports appellant's *prima facie* showing of discrimination.

Step 2: Race-neutral Explanation

As to each of these three distinct *prima facie* showings of purposeful discrimination, the burden shifted to the Government to offer a race-neutral explanation. In the usual case, in which the apparent discrimination is in the form of a prosecutor's peremptory challenge, this explanation might well take the form of an oral representation by the prosecutor as to his motivation for

the challenge. After all, the alleged offending official is present in the courtroom, and his explanation might be viewed as an offer of proof or, in a way, as evidence itself for this limited purpose.

When the official is the convening authority (as to his selection of the members) or his subordinate commanders (as to their nomination of potential members), however, that is not the case. Trial counsel has no first-hand "evidence" to offer by way of explanation—indeed, he likely has no dreamy idea why those officers acted as they did. In this context, then, it would seem logical that the only way in which the Government can meet its burden to come forward with a race-neutral explanation for the apparent purposeful discrimination is actually to offer *evidence. Compare Batson v. Kentucky, supra* (counsel needed only to offer oral explanation for his exercise of a peremptory challenge), *with Castaneda v. Partida*, 430 U.S. at 498, 97 S.Ct. at 1282 (Court remarked on absence of evidence to explain commissioner's out-of-court alleged discrimination).

172. In this case, no evidentiary hearing was held by which the Government could offer a race-neutral explanation for the three instances of apparent purposeful discrimination noted earlier. In light of the fact that the alleged offenders were not in the court room and never were called to the courtroom, and given the highly personal and subjective decisions that are in question (that is, nominating and selecting officers "best qualified" for service), it would seem beyond question that any "explanation" divined by the military judge here was speculation, no more and no less. That is inadequate.

Moreover, even the speculation seems to fall short. For instance, regarding the withdrawal of appellant's case from CMCO #1, the military judge suggested, "This was done to allay defense concerns about pretrial publicity." Of course, assuming such defense concern, it in no way inevitably justified an abrupt withdrawal of the case from a panel that had not been subject to any

voir dire regarding the impact of publicity on their ability to serve. Neither does it in any way whatsoever explain why the replacements were all-white.

The military judge did touch upon this latter concern when he made reference to the convening authority's "self-imposed limitations" of restricting the eligible pool of officers at Fort Hood to those who had arrived on or after January 1, 1989 (only $1^1/_2$ months earlier). Finding—on the basis of what, I am unsure—that this decision "shrank significantly" "the number of black officers from which to choose," the military judge essentially dismissed the defense's statistical data that showed substantial underrepresentation of African-Americans. Apart from any evidentiary basis for this conclusion, I have to wonder at the illogic of justifying an apparently discriminatory action by one's own intentional prior decision that would make such discriminatory effect virtually inevitable.

As to the *prima facie* showing of gender discrimination, there does not appear anywhere even a fainthearted effort to offer any gender-neutral explanation.

Step 3: Factfinding as to Discrimination

173. The final step in resolving *Batson* and *J.E.B.* issues is for the trial judge to decide whether the objecting party has carried his burden of showing purposeful discrimination. This is a factfinding exercise, *Batson v. Kentucky,* 476 U.S. at 98 n.21, 106 S.Ct. at 1724 n. 21, and the military judge's curious view that "there aren't any factual issues to be resolved" reflects a serious abdication of his responsibility.

Moreover, he simply was dead wrong when he stated, "The accused, initially, as I understand, elected to be tried by a panel of officers and enlisted soldiers." The defense made abundantly clear that its request for enlisted members was a tactical move in the hope of avoiding the all-white officer panel and in order to learn the race and gender of the enlisted members who would be

detailed. In no way, either initially or ultimately, did appellant indicate a wish actually to be tried by other than a panel of officers; he simply sought a panel the selection of which was not apparently infected by purposeful racial and gender discrimination. He may not be forced to abandon his statutory right to an officer panel and to add enlisted members in order to get what the Constitution guarantees him. *See United States v. McClain,* 22 MJ 124 (CMA 1986).

I could spend a good deal of time discussing—literally sentence by sentence—the flaws in the military judge's rationale for denying the defense motion. For instance, his reference to the convening authority's detailing African-American members to other courts-martial as a factor to defeat appellant's *prima facie* claim flies in the face of the fact that, since *Batson,* it no longer is required as it was under *Swain* to show a *pattern* of purposeful discrimination over time. Little would be gained, however, form such further dissection. Suffice to note here that the military judge for the most part did not engage in the required factfinding and, when he did seem to do so, acted on the basis of guesswork instead of evidence.

D

174. In sum, then, I believe that the majority opinion falls far short of the mark of reflecting an adequate treatment and resolution of appellant's persistent claims of purposeful race and gender discrimination in the selection process that culminated in the panel that finally tried him. Just as troublesome, I am convinced that a proper analysis under *Batson* and *J.E.B.* and related Supreme Court cases, as well as *Santiago-Davila* and *Greene* from this Court's precedent, ineluctably leads to this conclusion: The military judge apparently did not understand that analytical construct for resolving claims of purposeful discrimination in court-member selection and did not fulfill his responsibility in that construct.

Accordingly, I would return the record to the convening authority for an appropriate evidentiary hearing and for a proper analysis and resolution of appellant's claims based on the resulting evidence. Anything short of such action tolerates not only a conviction but likely an execution of a human being under an unresolved cloud of suggested purposeful racial and gender discrimination.

III

As the majority acknowledges, 41 MJ at 253, this Court held in *United States v. Curtis*, 32 MJ 252, 270-71, *cert. denied*, — U.S. —, 112 S.Ct. 406, 116 L.Ed. 2d 354 (1991), that proportionality review of an adjudged death sentence is required by Article 66(c), UCMJ, 10 USC § 866(c). The second time that case came before this Court, we suggested; "[I]t would be fitting for the Court of Military Review to consider generally similar cases reviewed by the Supreme Court of the United States in which state courts have imposed the death penalty for like crimes on that basis." *United States v. Curtis*, 33 MJ 101, 109 (CMA 1991) (*Curtis II*), *cert. denied*, — U.S. —, 112 S.Ct. 1177, 117 L.Ed.2d 421 (1992). This suggests a possible *universe* of cases against which to compare appellant's case for proportionality, but it does not address the equally troublesome question of which *factors or points of identity* will be used for comparison against cases in that universe.

175. I read appellant's contention in this Court (Issue XL—at 290) to focus primarily on the latter, but the majority opinion, like the court below, ignores the latter and finds comfort in its resolution of the former. I am unable to understand how the majority can satisfy itself that the statutorily required comparison was made without coming to grips with the question regarding on what bases that comparison must be made.

The universe of cases that was suggested in *Curtis II* —that apparently was followed by the Court of Military Review in this

case and that apparently satisfies the majority here—is relatively clear: It includes cases 1) reaching the Supreme Court from all of the state jurisdictions 2) where the death penalty actually has been adjudged 3) for like crimes. While the question of an appropriate universe is incredibly complex, I have no particular quarrel with this definition.

Within this universe, the Court of Military Review found the five cases cited by the majority, see 41 MJ at 290, although it is not at all clear that the Court of Military Review considered only those five cases, see 34 MJ 956, 969 n. 18 (1992) ("Among the cases examined were ..."). After examining those cases, the court "concluded that the sentence is generally proportional to those imposed by other jurisdictions in similar situations." 34 MJ at 969. The only indication of points of comparison is in the very general phrase, "in similar situations."

In light of the majority's avoidance of the issue, I do not believe that it is appropriate for me, now, to offer a view of appropriate points of comparison. One approach that certainly suggests itself is a comparison of aggravating factors and of aggravating and mitigating circumstances; a rather complex scheme for implementing this approach was discussed in *State v. Marshall*, 130 N.J. 109, 613 A.2d 1059, 1075-76 (1992). Others might reasonably be suggested and found suitable.

176. For now, I shall limit myself simply to saying this: Selecting an appropriate universe of cases against which to conduct a proportionality review is useless unless the Court of Military Review, having defined the universe, knows what points of comparison it will look for. The Court of Military Review in this case did not define those points of comparison; appellant has complained of that; but the majority here shuffles his complaint off into a discussion of universe, instead. That is a *non sequitor.* An appellant facing execution deserves more. So does the rest of society.

IV

In Issue LXVIII, appellant asks, in part, "whether the system of appointing capital defense counsel in the military is inadequate... in that the military system cannot provide adequate continuity of counsel..." I am persuaded that the "military system" *can* "provide adequate continuity of counsel." Regrettably, however, generally it has not done so, and I take this opportunity to express at least this Judge's growing concern over the failure of the pattern of assignment of appellate counsel to provide continuity in death-penalty cases—continuity that assures the client competent representation and that assured the system of appellate judicial review that it can proceed with some modicum of efficiency and effectiveness.

The majority writes: "To the extent that appellate counsel have lacked experience or suffered from lack of continuity, the impact has been on the efficiency of judicial administration rather than the quality of representation." 41 MJ at 299. Describing the bend-over-backward approach that has been followed in an effort to avoid harm to appellant from lack of continuity of appellate representation, the majority recites:

> Recognizing the potential inefficiencies noted above, both the court below and this Court have liberally granted extensions of time and allowed filling of supplemental pleadings and citations of authority even after oral argument. This Court has considered issues not raised before the court below.... [We] have accommodated counsel to the maximum extent possible to ensure that all issues are considered. Defense appellate counsel concede that their pleadings have been voluminous, with overlapping and redundant assignments of error.

41 MJ at 299. That is no way to run a ship!

The Ungoverned Revolving Door of Defense Counsel

177. Seven appellate counsel represented appellant in the Court of Military Review; five others represented him in this Court.[6] It is unclear at times who was the lead counsel in the Court of Military Review because counsel is not required by that court's Rules of Practice and Procedure or by the court's internal operating procedure (see Rule 26, Court of Military Review Rules of Practice and Procedure, 22 MJ CXXXVIII) to file a motion for leave to withdraw if the reason for withdrawl was reassignment outside the Defense Appellate Division and if the chief of that division assigns new counsel from within the division. *See* para. 2-2, USACMR Internal Operating Procedure, 1986; Ruel 13.1(b)(2), USACMR Internal Rules of Practice and Procedure (1992). *Compare* Rule 16(b), Rules of Practice and Procedure, United States Court of Military Appeals, 38 MJ LXXXIV. No expression of concern appears anywhere for even informing the client of an impending change in representation, much less seeking the client's views. *See* Standard 5-5.3, ABA Standards for Criminal Justice, Providing Defense Services (2d ed. 1986); Rule 16(b), USCMA Rules, *supra*; Rule 1.16(d), AR 27-26, Professional Conduct for Lawyers (1992).

The confusion is so pervasive that even opposing counsel demonstrated confoundment: In a notice of appearance filed on June 24, 1991, the lawyer who apparently, but not clearly, was appellant's third lead counsel in the Court of Military Review observed in a footnote that a government motion for extension

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[6] In the Court of Military Review, the following counsel represented appellant at one time or another during the barely more than 1½ years this case was pending there: Captain Ralph Gonzalez (lead); Captain James K. Lovejoy; Captain Timothy Riley; Colonel Robert Kirby; Captain Michael Coughlin (lead); Captain Emmett Wells (lead); and Captain James Heaton. The following counsel have entered appearances in this Court: Captain Teresa Norris (lead); Captain David Thomas; Major Fran Walterhouse; Lieutenant Colonel James Weise; and Captain Roy Hewitt.

of time filed 3 days earlier had asserted: "Appellate defense counsel, Captain Michael Coughlin, does not oppose this motion." Appellant's counsel continued by noting, however: "Captain Coughlin was released from this case several weeks ago by the Chief, Defense Appellate Division, as he was pending reassignment to a commissioner's position with this Court."

178. Moreover, without even scratching the surface, it is clear from various pleadings in this case that lack of continuity and accountability of counsel directly caused substantial inefficiencies at both appellate levels. For example: This same lawyer revealed in an affidavit that he was asked to assume lead chair representing appellant in June 1991 because Captain Coughlin had been reassigned, over objection of the Chief, Defense Appellate Division; this lawyer, of course, found that assuming this responsibility on top of his other cases (he was not relieved of his normal workload) was extraordinarily burdensome; these pressures precluded him from attending any educational seminar on capital litigation (he "had no experience or specialized training in the field of capital litigation") or to meet with appellant until after oral argument or to engage in any "extra-record investigation"; and that, when he was approached by a commissioner of the Court of Military Review in November 1991 about scheduling oral argument, the lawyer "had not even completed reading the record of trial." Notwithstanding his expression of a wish for a date in January 1992, oral argument was set for December 9, 1991. Def.App. Ex. A. A motion to reschedule oral argument was denied on December 4, 1991.

Another example: So hard pressed was this lawyer to prepare for oral argument that he "had overlooked prior to oral argument" what he considered to be an important issue, which caused him to file—after oral argument—a motion to submit a Supplemental Assignment of Error. During this same post-argument time frame, he had the opportunity, for the first time, to do some investigation into appellant's medical records (other than those in the record of trial) and into the interpretation of some of those records and tests. This investigation ultimately persuaded him to

file a motion to submit yet a *second* Supplemental Assignment of Error—this time, via a motion for reconsideration *after* the Court of Military Review had issued its decision in this case.

179. It is plainly evident, then, the mischief created in the Court of Military Review from lack of continuity of representation there of appellant: This lawyer found himself so far behind the time curve that, 1 month before argument, he had not even completed reading the transcript and that, after oral argument, he was forced to file two motions to draw additional issues to the court's attention. This is a far cry from traditional concepts of efficient or effective appellate review!

The chaos continued in this Court. The Judge Advocate General forwarded this case to this Court on May 8, 1992, for our mandatory review, see Art: 67(a)(1), UCMJ, 10 USC § 867(a)(1) (1989). On June 24, *yet another* lead counsel for appellant (apparently, the *fourth)* filed a Notice of Appearance and Motion to Hold Case in Abeyance. Therein, she reported that her predecessor, referred to above, had departed the Defense Appellate Division on reassignment to Panama on May 22 and that this "departure was sudden and presents grave problems in regard to the continuity of representation of appellant." She and two other associate appellate counsel had not been detailed to represent appellant until May 11—a scant 11 days before her predecessor's departure. She reported in detail about a variety of events and problems that precluded any of the three from any meaningful discussion at all with her predecessor. "Therefore, the undersigned were left with a 1½ page memorandum from [her predecessor] discussing what he thought were the best issues in the case and two large boxes of disorganized files with a good luck note attached thereto."

The motion represents, as well, that all three of these newly appointed counsel were "woefully underqualified to represent an accused in a capital case." Counsel offered a detailed professional resume of the experience and education of each of the three, which tended to support counsel's assessment. Indeed,

appellant's lead counsel in this Court had no legal experience prior to entering the Army; was assigned directly out of the JAG basic class to the Defense Appellate Division; and little more than 1 year later was assigned as lead appellate counsel in this capital case, without having the benefit of trying a single case in a civilian or military courtroom. Ruefully, the backgrounds of the other two are no more substantial. The disadvantage to which this lack of training and experience put this defense team—brand new, with no continuity at all from prior counsel—is palpable.

180. This Court granted a number of motions for enlargement of time within which to file a defense assignment of errors and brief; each was pursuant to a detailed accounting by defense counsel of their efforts in preparing to represent appellant in this Court as well as to meet their legal and ethical responsibilities to their other clients. Finally, we denied a similar request for more time on October 9,. 37 MJ 16. Less than 1 week later, appellant's lead counsel and one of her associate counsel by separate motions sought this Court's permission to withdraw from this case. In both instances, counsel included a detailed averment of what they already had done to prepare to represent appellant and what they believed yet needed to be done if their legal and ethical responsibilities in this capacity were to be met. In both instances, too, counsel concluded that these tasks were impossible to accomplish within the time permitted by this Court and, so, felt absolutely compelled to ask to be relieved from this dilemma. The supervising attorneys of both these counsel also moved to withdraw.

Ultimately, of course, as the majority opinion implies, competing pressures were worked out, and appellant's appeal proceeded. What I have sought to offer, however, is just some flavor of the professional consternation caused to appellate counsel of good intentions and general competence but of limited experience and special training; of the acute problems with efficient and orderly processing of this case through the course of

appellant's statutorily guaranteed appellate review; and of the untoward picture of our appellate system that all this inevitably portrays.[7]

Governing the Resolving Door

181. It is time to fix what is broken.

I am not alone in expressing frustration of this Court at the delays and inefficiencies in capital litigation that are the direct

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[7] Doubts about adequate continuity of counsel and related matters involving the level of defense services to military death-penalty cases recently was the subject of congressional attention. In a letter to the Secretary of Defense, attached to this opinion as Appendix D, the Chairman of the Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary, expressed concern that:

> (1) defense counsel in military death penalty cases need not have the level of experience required of their civilian counterparts, *cf.* 21 U.S.C. § 48(q)(5)—(6) (setting substantial minimum experience requirements for appointed counsel in federal death penalty trial and post-trial proceedings),
> (2) no procedures are in place—such as a presumption right to appointment and compensation of qualified *civilian* co-counsel—to provide continuity of representation,
> (3) the military justice system may have failed to recognize the necessity of providing the defense with independent and highly qualified investigative and expert services in capital cases at the trial and post-conviction levels.

Highlighting these concerns was intended "to ensure that in proceedings where life itself is at stake, no American serviceman or servicewoman is denied the essential tools of an adequate defense." For excellent general discussion of related problems in connection with defense counsel in trial and appellate litigation of capital cases, *see McFarland v. Scott*, __ U.S. __, 114 S.Ct. 2785, 129 L.Ed.2d 896 (Blackmun, J., dissenting from denial of petition for a writ of certiorari), and sources cited therein; D. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, Unpub. Thesis on file at The Judge Advocate General's School, Army (May 26, 1994).

result of lack of continuity of appellate counsel. For instance, on December 20, 1993, in the appeal of the capital case of *United States v. Gray*, 39 MJ 351, we published an order in which we expressed the Court's "concern[ ] about the management and continuity of appellate representation in this case." We proceeded to direct each counsel of record before this Court in that case to file an affidavit directed at his entry into and departure from active representation of Gray; what counsel had done during his representation; what counsel had done to assure a smooth transition to subsequent counsel when he was reassigned; what had been done to advise Gray about counsel's intended withdrawl and Gray's reaction if any; and why withdrawing counsel had not complied with this Court's Rule 16 by filing a motion to withdraw.

Additionally, as recently as June 17, 1994, in the appeal of yet another capital case—*United States v. Murphy*—this Court published an order that: reflected counsel's assurance "that the withdrawl requirements of Rule 1.16, Rules of Professional Conduct for Lawyers, Army Regulation 27-26 (Legal Services, 1 May 1992), have been satisfied"; granted "the defense motion to extend its final briefing time until September 30, 1994"; and established a briefing schedule for the Government's answer and any defense reply. 40 MJ 288.

182. Importantly, Judge Cox, joined by Chief Judge Sullivan, dissented from further extension of briefing time, noting that the briefs under our rules had been due on September 20, 1993. The reasoning supporting this dissent is telling:

> Extensive briefs were filed in the Court of Military Review. There have been no material changes in the law; the record of trial has not changed; and there have been no other reasons advanced to justify further delay....
>
> Justice delayed is not justice.

40 MJ 288.

My brothers were right: None of these things had changed. Only one thing had changed: Appellate counsel for Murphy—and they changed over and over! The problem in Murphy was not the current lawyers taking more time than necessary to file their brief, and I voted for the order because nothing is gained and much is lost by forcing lawyers into court before they adequately are prepared to be there. Rather, the problem was turnover of appellate counsel that effectively put the case on a virtual treadmill.

My brothers were right about one other thing, too: Justice delayed is not justice—not to the accused and not to society. It is time to resolve the continuity of counsel problem in order to preclude future delays of justice in this regard.

U.S. v. LOVING
Cite as 41 M.J. 213 (1994)

APPENDIX A

AFFIDAVIT

I CORTEZ CROFTON AYLOR III, [illegible] ... wish to make the following statement under oath. I was the president of the jury for the court martial of PVT Dwight Loving at Fort Hood, Texas in 1988. As I recall, the jury was responsible for findings and sentencing after hearing all of the testimony. I allowed no discussion of the case between members of the jury outside of the courtroom based on instructions from the judge. No one was allowed to watch local television or read any of the local newspapers. To the best of my knowledge no one on the jury violated this trust. Captain David Thomas of the Defense Appellate Division in Falls Church, VA, contacted me on 23 February 1993 and asked me to outline briefly how I handled the sentencing phase of the trial. The jury received instructions from the judge on sentencing and then we went into the jury room. I explained to the other members of the jury what we were supposed to do and how we would do it. I also reminded everyone that the minimum sentence was life imprisonment as explained to me by the judge. We did not re-vote and aggravating factors during the sentencing procedure. After I was satisfied that everyone understood the rules of evidence and their ramifications and was ready to vote, they would write down the sentence on a blank piece of paper, fold it up and pass it to the junior member of the jury. The junior member would give me the folded pieces of paper and I would read each one aloud to the jury. I was very cautious to avoid any influence on the jury; we all had equal votes in this process. The first vote resulted in the following: 7 votes of; reduce to E1, forfeiture of all pay and allowances, bad conduct discharge and death; 1 vote of reduce to E1, forfeiture of all pay and allowances, bad conduct discharge and life imprisonment. The judge had explained before we adjourned that the death penalty required a unanimous vote. I questioned no one about their vote, it was to be secret. I reviewed the rules of evidence, for everyone, as explained to me by the judge and we all reviewed the evidence in the jury room again. After another 1 1/2 hours of review, I asked if everyone was prepared to vote again. They said they were. We again wrote our sentences on blank pieces of paper, folded and gave them to the junior member of the jury. He gave them to me and I read them aloud to all of the members of the jury. The second vote resulted in the following: 8 votes of; reduce to E1, forfeiture of all pay and allowances, bad conduct discharge and death. I then informed the judge that we had reached a unanimous decision on the sentence. He reconvened the court, officially reviewed our findings and gave them back to me to read to the accused. I read the sentence to PVT Loving. The judge released the jury.END OF STATEMENT *dat*

SWORN BEFORE ME ON _____

CORTEZ C. AYLOR III
Colonel, Engineer
United States Army

State of Kansas
County of Leavenworth

Signed or attested before me on February 24, 1993, by Cortez C. Aylor III.
Wanda R. Fairchild
Notary Public
My commission expires 14 Oct 95

WANDA R. FAIRCLOTH
NOTARY PUBLIC
STATE OF KANSAS

APPENDIX B

I, Major John C. Napoli, Jr., USA ... affirm that the following is a true and correct statement of what occurred to the best of my recollection during the voting on the sentence of death in the case of Private Dwight J. Loving.

1. As a panel member in the case, I heard all of the evidence during the sentencing portion of the trial.

2. Following the closing arguments and instructions from the military judge, we adjourned to deliberate.

3. Colonel Aylor was the president of the panel and he took charge in leading the discussions. We discussed the facts and evidence in the case.

4. Following Colonel Aylor's remarks, we voted by secret written ballot. Colonel Aylor counted the ballots.

5. Since there was not a consensus, we discussed the facts and evidence in the case again. Afterwhich, Colonel Aylor instructed us to vote again. This vote resulted in an unanimous sentence to death, the voting ceased and the results were marked on the sentencing worksheet.

6. Following these voting procedures, we returned to the courtroom and sentenced Private Loving to death.

JOHN C. NAPOLI, JR.

State of Texas)
County of Dallas)

SWORN AND SUBSCRIBED TO before me this 24 day of February, 1993.

Notary Public or Authorized Officer

BEST AVAILABLE COPY

APPENDIX C

I, Captain Thomas J. Williams, SSN . . affirm that the following is a true and correct statement of what occurred to the best of my recollection during the voting on the sentence of death in the case of Private Dwight J. Loving.

1. As a panel member in the case, I heard all of the evidence during the sentencing portion of the trial.

2. Following the closing arguments and instructions from the military judge, we adjourned to deliberate.

3. Colonel Aylor was the president of the panel and he took charge in leading the discussions. We discussed the facts and evidence in the case. Then Colonel Aylor told us that we each had two options, we could vote life imprisonment or death, but that death required a unanimous vote.

4. Following Colonel Aylor's remarks, we voted by secret written ballot. Colonel Aylor counted the ballots and the result was seven in favor of death and one in favor of life imprisonment.

5. Since there was no consensus, we discussed the facts and evidence in the case again. We did not seek help from the military judge. Instead, following our continued deliberations, Colonel Aylor instructed us to vote again. We voted using the same procedure as before, picking between death and life imprisonment. The result of the second vote was eight in favor of death and zero in favor of life. Since this vote resulted in an unanimous sentence to death, the voting ceased and the results were marked on the sentencing worksheet.

6. Following these voting procedures, we returned to the courtroom and sentenced Private Loving to death.

THOMAS J. WILLIAMS

State of Utah)
County of Utah)

SWORN AND SUBSCRIBED TO before me this 23rd day of February 1993.

Notary Public

NOTARY PUBLIC
STATE OF UTAH
ALAUNA J. DUKE

APPENDIX D

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY

November 23, 1993

The Honorable Les Aspin
Secretary of Defense
Department of Defense
Room 3E880
The Pentagon
Washington, D.C. 20301-1000

Dear Secretary Aspin:

I am writing to inquire about the adequacy of the defense services provided in death penalty cases brought against American servicemen under the Uniform Code of Military Justice.

At a time when the Congress has been devoting considerable attention to the adequacy of the defense accorded to capital defendants in state court proceedings, and with the Clinton Administration strongly supporting federal legislation to guarantee that an adequate defense is actually provided in all such cases, it seems to me especially important that the federal government provide, and be seen to provide, the expert legal assistance necessary to ensure that the death penalty will not be erroneously imposed in any court of the United States. Many if not most of the death penalty prosecutions now occurring under federal jurisdiction are brought in military courts martial. However, the military services have not, to my knowledge, adopted standards and procedures governing qualification, appointment, and training of defense counsel in such cases, nor guaranteeing the independent expert and investigative services necessary to an adequate defense.

In recent years, the Congress has been considering various proposals for comprehensive reform of habeas corpus law and procedure. Much of the impetus for this review has been provided by mounting evidence that the adjudication of death penalty cases originating in state courts has been unreasonably protracted, and at the same time that many of these cases are marred by serious factual and constitutional errors. Since 1990, the House Judiciary Subcommittee on Civil and Constitutional Rights, which I chair, has reviewed a great deal of evidence showing that the greatest single cause of both delay and error in capital cases is the systemic inadequacy in the provision of defense services.

The Honorable Les Aspin
November 23, 1993
Page 2

To get at the root of this problem, a number of legislative proposals have included thoroughgoing reforms in the way that state criminal courts appoint, train, and compensate defense counsel in the death penalty cases from the trial level onward. One of these proposals, Senator Biden's Habeas Corpus Reform Act of 1993, S. 1441, was introduced last summer with the strong support of President Clinton and the Department of Justice. This legislation would have provided very powerful incentives for the states to create special certification authorities to identify truly competent lawyers available for appointment as defense counsel in death penalty cases at the trial and post-trial stages, and would have helped to ensure that the defense in such cases was provided with the expert and investigative services necessary to ensure a fair and reliable result. Similar legislation has been introduced in the House by Judiciary Committee Chairman Jack Brooks. See Title III of H.R. 3131. While it does not appear that these habeas reform proposals will be acted on in the current session of the Congress, I think it is fair to say that a consensus is developing that whatever habeas reform legislation finally does emerge from the legislative process must include measures to improve the adequacy of defense services in state court capital proceedings.

In view of this emerging trend in habeas corpus reform, and considering the strong support of the President and the Attorney General for federal intervention to improve the level of defender services in state death penalty cases, it seems self-evident to me that the military justice system should review its performance in this area. In particular, I am concerned that

(1) defense counsel in military death penalty cases need not have the level of experience required of their civilian counterparts, Cf. 21 U.S.C. § 848(q)(5), - (6) (setting substantial minimum experience requirements for appointed counsel in federal death penalty trial and post-trial proceedings),

(2) no procedures are in place--such as a presumptive right to appointment and compensation of qualified civilian co-counsel--to provide continuity of representation,

(3) the military justice system may have failed to recognize the necessity of providing the defense with independent and highly-qualified investigative and expert services in capital cases at the trial and post-conviction levels.

I would appreciate hearing from you as to how current practice concerning the provision of defense services in death penalty cases

The Honorable Les Aspin
November 23, 1993
Page 3

within the military justice system measures up to the standards advocated for state criminal justice systems by the Administration. I look forward to working with you to ensure that in proceedings where life itself is at stake, no American serviceman or servicewoman is denied the essential tools of an adequate defense.

Sincerely,

Don Edwards

Don Edwards
Chairman
Subcommittee on Civil and
Constitutional Rights

DE:vsp

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

USCA Dkt. No. 68033/AR
CMR Dkt. No. 8901123

UNITED STATES, APPELLEE

v.

DWIGHT J. LOVING, (065-56-0228), APPELLANT

ORDER

On consideration of appellant's motion to admit defense appellate exhibits GGG and HHH and petition for reconsideration of the opinion of the Court dated November 10, 1994 (41 MJ 213), it is, by the Court this 2nd day of February, 1995,

ORDERED:

That appellant's motion to admit defense appellate exhibits GGG and HHH is hereby granted;

That the petition for reconsideration regarding Issue III is granted only to the extent that the words "stated in post-trial affidavits that he" at 41 MJ 250 are deleted from the opinion of the Court; and

That in all other respects the petition for reconsideration is denied.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (NORRIS)
Appellate Government Counsel (GIOVANNELLI)

APPENDIX C

U.S. ARMY COURT OF MILITARY REVIEW

ACMR 8901123

UNITED STATES, APPELLEE,

v.

PRIVATE DWIGHT J. LOVING, 065-56-0228,
UNITED STATES ARMY, APPELLANT.

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3 Feb. 1992
Reconsideration Denied 5 March 1992

Accused was convicted by general court-martial, 1st Cavalry Division, S.V. Saynisch, J., of premeditated murder, felony-murder, attempted murder, and robbery, and he was sentenced to death. The United States Army Court of Military Review, De Giulio, Senior Judge, held that: (1) mistrial was not warranted by military judge characterizing as "absolutely ridiculous" accused's contention that his girlfriend was adverse witness subject to leading questions on direct examination; (2) trial counsel's argument on sentencing to vindicate society's victims was permissible; (3) failure to record defense counsel's two-minute opening statement at beginning of sentencing procedures was not substantial omission and did not change characterization of record as verbatim transcript; and (4) prosecution's peremptory challenge did not violate Fifth or Eighth Amendments, even though prosecution did not first challenge member for cause.

Affirmed.

For Appellant: Captain Emmett G. Wells, JAGC (argued), Colonel Robert B. Kirby, JAGC, Captain Ralph L. Gonzalez, JAGC, Captain James K. Lovejoy, JAGC (on brief).

For Appellee: Major Joseph C. Swetnam, JAGC (argued), Colonel Dayton M. Cramer, JAGC, Captain Timothy W. Lucas, JAGC, Captain Jonathan F. Potter, JAGC (on brief).

Before De GIULIO, HAESSIG, and ARKOW, Appellate Military Judges.

OPINION OF THE COURT

De GIULIO, Senior Judge:

Appellant was tried by a general court-martial composed of officers. Contrary to his pleas, he was found guilty of premeditated murder, felony murder, attempted murder, and four specifications of robbery, in violation of Articles 118, 80, and 122, Uniform Code of Military Justice, 10 U.S.C. §§ 918, 880, and 922 (1982) [hereinafter UCMJ]. He was sentenced to death, a dishonorable discharge, and forfeiture of all pay and allowances. The convening authority approved the sentence.

Appellant asserts sixteen assignments of error and questions the appropriateness of the sentence. Several of the issues raised have been resolved by the Court of Military Appeals and will not be discussed in this opinion. See *United States v. Curtis*, 32 M.J. 252 (C.M.A.), *cert. denied*, — U.S. —, 112 S.Ct. 406, 116 L.Ed.2d 354, *remanded*, 33 M.J. 101 (C.M.A. 1991).[1] We find no error that substantially prejudices appellant, find the sentence appropriate, and affirm the findings of guilty and the sentence.

The evidence at trial, consisting of appellant's confession, eyewitness testimony (except for the two murders), physical evi-

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[1] *Curtis* was decided after the original brief and assignment of errors on behalf of appellant were filed with this Court.

dence, and other corroborating evidence unequivocally established appellant's criminal conduct on 11-13 December 1988. In December 1988, appellant purchased a .22-caliber pistol from another solider. After the purchase, appellant said the pistol made him feel like "I was big . . . and nobody mess with me no more." Despondent over what he perceived as a deteriorating relationship with his girlfriend and his lack of money to buy her Christmas presents, appellant decided to rob stores. On the evening of 11 December 1988, he entered and robbed at gunpoint a 7-Eleven convenience store in Killeen, Texas. During the course of the robbery, he fired two shots into the counter and soda fountain, which were behind the cashier. He obtained approximately $38.00 from this robbery. Among the currency obtained by appellant was a bill from which the serial number had been recorded by the store.

About an hour later, appellant entered another 7-Eleven store in Killeen, produced a pistol, and demanded money. When the cash register made beeping noises during the cashier's attempts to open it, appellant fired a bullet into the register. Appellant then pointed the pistol at the cashier and demanded she put the money in a paper bag. He grabbed the bag and ran out of the store, firing a round back into the store as he departed. Appellant took approximately $52.00 during this robbery. The serial number from one of the bills obtained by appellant had also been recorded by the store.

Dissatisfied with the meager amount of money he had obtained from the 7-Eleven robberies, appellant made the intentional and considered decision to rob taxicab drivers. On the night of 12 December 1988, appellant called for a taxicab to take him from a grocery store in Killeen to his barracks at Fort Hood. The driver of the taxicab was an Army private who was moonlighting for extra money. After entering the taxicab and after arriving at Fort Hood, appellant directed the driver to park in a dark secluded area behind the barracks. He produced a pis-

tol, held the pistol to the driver's head, ordered the driver to shut off the car's motor and lights, and demanded all the driver's money. After replying "bullshit" to the driver's protests that he had surrendered all of the money, appellant shot the driver in the back of the head. While looking at the hole in the back of the victim's head and the blood "gushing out," appellant cocked the pistol and shot him the back of the head again. The taxi driver died as a result of these gunshot wounds.

Appellant fled from the cab and went to his barracks room where he counted the money. Disappointed at the small amount of money he had obtained, appellant immediately called for a taxicab to be dispatched to Fort Hood. After entering the cab, appellant directed the driver, a retired Army sergeant, to a dark secluded street in Killeen. He pointed his pistol at the driver, told him to turn off the lights and the motor, and demanded money. The driver surrendered a grey money pouch and a red wallet. Appellant ordered the driver to lay down on the seat. He then shot the driver in the head, killing him.[2]

Later that evening, appellant took his girlfriend, Nadia, to a nightclub in Killeen. At about 0100 on 13 December 1988, a taxicab driver took appellant and Nadia to the vicinity of Nadia's house. Appellant decided to rob the taxi driver. Appellant told Nadia to go home because he was going to the store to get toilet paper or cigarettes.[3] Nadia exited the taxicab. Appellant produced a pistol and directed the driver to a dark secluded street. Appellant told the driver to shut off the lights and engine. While holding the pistol to the driver's neck, he demanded money. The driver gave him about $94.00 of cab money, his coin changer,

[2] The next day appellant threw the wallet into the garbage at his unit and the money pouch into the garbage at a local grocery store. These items were later recovered after appellant directed authorities to their location.

[3] Nadia testified appellant was to buy cigarettes. In his confession, appellant stated he was to get toilet paper. We view this discrepancy as insignificant.

and his wallet. Appellant then jerked the driver's head around and ordered him to open his mouth. Believing he was going to be killed, the taxicab driver grabbed the pistol turning it away from his head as it was fired. Appellant bit the driver's hand. In the ensuing struggle, appellant pulled the driver into the back seat, trying to get the gun away from him. The driver turned the pistol on appellant and pulled the trigger, but the pistol would not fire. Appellant told the driver that the pistol only contained blanks. The driver, still in possession of the pistol, cocked it and attepted to shoot appellant; again, the pistol would not fire. Realizing that the pistol would not fire, the driver got out of the taxicab. As the driver exited the taxicab, appellant viciously bit the driver on the head and on the back. Two of the three bites caused permanent scarring. The driver broke away and started running. As appellant pursued him, the driver "hit him in the gut" with his elbow. The driver then safely fled the scene. Appellant ran back to Nadia's house and hid the gun behind the house.

Using information from the taxicab driver, criminal investigators were able to contact Nadia who identified appellant. Appellant was apprehended. The investigators took from appellant the third driver's wallet and the two bills from the 7-Eleven stores from which the serial numbers had been recorded. Among matters seized in a consent search of Nadia's house were the pistol found wrapped in a paper bag behind the house, .22-caliber bullets which were found in a drawer with appellant's uniforms, .22-caliber bullets and casings which were found in a garbage can in the house, and appellant's bloodstained jacket.

In two confessions, one to the Army Criminal Investigation Command (CIC) agents[4] and one to the local authorities, appellant admitted the commission of each offense and described them

[4] This confession was recorded on video tape.

in detail.

Trial defense counsel attempted to paint a picture of appellant as a poor inner-city kid who was raised in a rough neighborhood without the guidance of a father. He atempted to present appellant as a soldier who performed well in the military under strong leadership but got into trouble when that leadership was absent. He attempted to portray Nadia as an immigrant who was in trouble with the Immigration and Naturalization Service, needed to get a "green card" in order to stay in the United States, and used appellant to get money for her support and to fund necessary trips to New York City to settle her immigration problems.[5] He attempted to portray Nadia as a "gang leader," who was instrumental in getting appellant to commit the offenses. In an effort to do this, appellant called Nadia as a defense witness. She testified that she was born in Milan, Italy. She went to Germany, met an American, followed him back to the United States, and married him. After they moved to New York, they separated, and she went to Killeen, Texas. Her immigration paperwork had been transferred to New York and she was having diffiiculty getting her "green card" so she could remain in the United States. She obtained a job in a bar, and her father always sent her money. She never wanted or asked for any money from appellant. Shortly after she met the appellant, he began sleeping with her at her apartment. When appellant purchased the pistol, he showed it to her. She made him remove the pistol from her house because she didn't want a gun around the house.

At the time, Nadia did not know appellant intended to rob the stores. She learned of his crimes after he had committed them.

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[5] Although not a defense to appellant's crimes, defense counsel apparently presented these matters hoping that the court members would find appellant guilty of lesser offenses to the murder specification or in an attempt to achieve less than unanimous findings of guilty of those offenses. If successful, the tactic would have avoided imposition of the death penalty.

At the request of appellant, she borrowed a friend's car and drove him to the vicinity of the two 7-Eleven stores which appellant robbed. Appellant made Nadia park some distance from the stores where she could not see them. On these occasions, she did not know where he had gone. Later, they used money provided by appellant too buy cocaine which they used. At some point, he told her that he had killed people to get money and showed her a red wallet, a zipper bag, and money. She did not believe him.

On the night of 12 December appellant and Nadia went to the Nubia Temple club where appellant had a jealous confrontaton with another man over her. After appellant challenged the man to fight, a pistol fell out of appellant's pocket and discharged. Appellant and Nadia then left the club and took a taxicab, stopping at a 7-Eleven on the way to her apartment. When they neared her apartment, appellant stated he had forgotten her cigarettes and told her he would get them. At that time she noticed he had the pistol between his legs. Nadia got out of the taxicab and asked appellant to go with her. He refused. She walked home. He departed in the taxicab, returning a short time later. Later, she was approached by investigative agents and identified appellant as her boyfriend. She consented to the search of her house. It is Nadia's testimony which is the subject of appellant's first assignment of error.

I.

Appellant asserts that the military judge improperly denied appellant's request to provide an accomplice testimony instruction regarding the testimony of Nadia. Appellant contends that:

> Although the instruction may not have gained appellant a finding of not guilty to any of the charges, the panel members' perception and understanding of Nadia's impact on appellant's actions were vital to appellant's ultimate goal on sentencing to prove to the members that he does not deserve to die for his crimes.

> The entire defense case relied upon its ability to demonstrate that appellant was motivated and encouraged to commit those offenses by Nadia. By denying appellant's request for an accomplice instruction, the military judge effectively derailed appellant's entire theory of defense with respect to the ultimate issue of whether appellant deserves to die for his offenses.

The test to be applied in determining if a witness is an accomplice is whether the witness could be convicted of the same crime for which the accused is being prosecuted. *United States v. McKinnie*, 32 M.J. 141, 143 (C.M.A. 191); *United States v. Scoles*, 33 C.M.R. 226, 231 (C.M.A. 1963). At trial, appellant's counsel requested an accomplice instruction as to Nadia. He pointed to her personal relationship to appellant, her need for money, her driving the car to the vicinity of the 7-Eleven stores, the physical evidence found at her home, and letters sent to appellant while he was confined which defense counsel claimed tended to suggest that she wished him to hide her involvement.[6] This Court views the evidence as the military judge did. Appellant's confession and Nadia's testimony show that Nadia did not know of the crimes until after they were committed. Even then, she did not believe appellant committed them. The evidence presented at trial does not implicate her in the crimes. There is no basis to charge her with any of them,[7] let alone convict her of them. *See McKinnie*, 32 M.J. at 143. The military judge's denial of the request for the accomplice instruction was correct.

II.

A part of appellant's second assignment of error also arises

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[6] The referenced letters are merely love letters. It takes great imagination to give them this sinister interpretation.

[7] Upon cross-examination by trial defense counsel, a local policeman testified that there was no evidence upon which to charge Nadia and that no charges had been filed against her.

from Nadia's testimony. Appellant alleges, in general, that the military judge's failure to grant appellant's motion for mistrial for cumulative error deprived him of a fair and impartial proceeding. Appellant divides this assertion into two parts: that the military judge failed to recuse himself for bias against appellant upon defense motion, and that the military judge failed to grant a motion for mistrial based upon an allegation that he commented upon the viability of the defense theory of the case in front of the members. These will be discussed in inverse order.

The defense contention at trial was that Nadia was a manipulative sinister force who directed appellant's criminal activities; or, in the alternative, her presence and influence over appellant and the overall circumstances of the offenses were such as not to warrant capital punishent of appellant. In an attempt to establish a basis for this theory, Nadia was called by the defense. In his direct examination of Nadia, trial defense counsel used leading questions. Eventually, trial counsel objected and that objection was sustained. Trial defense counsel contended that Nadia was an adverse witness because she provided information against appellant, and therefore the defense should be able to ask leading questions.[8] Even though the military judge cautioned trial defense counsel not to lead his witness, counsel continued to do so throughout Nadia's testimony. Only when trial counsel again objected did the military judge direct that leading questions not be asked. After trial defense counsel was told several times that the witness was not hostile and not to lead the witness, the following colloquy occurred before the court members:

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[8] This information appears to have been her statement to investigators that appellant was her boyfriend, and that he was a passenger in the taxicab. It is evident from the record that Nadia was reluctant to implicate appellant. She provided those statements to police each containing more information relating to appellant's criminal conduct. It is clear that she did what she could to protect appellant without getting herself into trouble.

DC: Your Honor, I would, again, request the Court's permission to allow me to cross-examine this witness, she is clearly adverse to my client—

MJ: No—absolutely ridiculous. Proceed. . . .

DC: Your Honor, I would like to ask the following questions, to prove that this—at least, from the government's position—is the key witness against my client. The testimony that I seek to elicit from her is that they told her that she was the key witness in the case against Dwight Loving; which makes her—in the defense view—an adverse witness to my client.

MJ: I told you that was ridiculous, before. How many times have I gotta tell you it's ridiculous? The objection is sustained.

DC: Yes, sir.

MJ: Don't challenge me.

DC: Yes, sir. We will—we would like to submit a written brief, on this, at a later date, if we could, to make sure that we note all the objections we have.

MJ: No.

DC: No.

MJ: You've entered your objections—

DC: Alright—

MJ: —I have listened to your objections—three or four times—I have sustained; and, you're not going to ask any leading questions.

DC: Yes, Sir.

MJ: So, please, drive on.

DC: We feel this—

MJ: You open your mouth about it, again, counsel, and I'm going to clear the courtroom and we're going to have a discussion.

Subsequently, in an Article 39(a) session, after again litigating whether Nadia was an adverse witness, trial defense counsel objected to the military judge's response before the court members as "possibly prejudicial." Defense counsel moved for a mistrial on the basis that Nadia was a key witness to the defense and that the military judge's comments concerning the defense contention that she was an adverse witness as "ridiculous" and "absolutely ridiculous" prejudiced appellant and denied him a fair trial. The military judge denied the motion. He agreed with trial counsel that an instruction could cure any possible error. The military judge offered to provide a curative instruction to the court members in appropriate language fashioned by the defense. Defense objected to an instruction because it would be a "red flag" to the court members. Based upon defense desires, the military judge did not immediately instruct the court to disregard any comments but determined that he would give the members a general instruction to disregard any of his comments, statements, and gestures which would seem to indicate an opinion on the guilt or innocence of the accused.

A mistrial is a drastic remedy and should be granted only when manifestly necessary to preserve the ends of justice. *United States v. Garrett*, 24 M.J. 418, 417 (C.M.A. 1987); *United States v. Jeanbaptiste*, 5 M.J. 374 (C.M.A. 1978). Whether to grant a mistrial is within the discretion of the military judge, and his decision will not be disturbed unless there is a clear abuse of discretion. *United States v. Rushatz*, 31 M.J. 450, 457 (C.M.A. 1990); *Jeanbaptiste*, 5 M.J. at 376. "Giving a curative instruction, rather than declaring a mistrial, is the preferred remedy for curing error when the court members have heard inadmissible evidence, as long as the curative instruction avoids prejudice to the accused." *United States v. Balagna*, 33 M.J. 54, 56 (C.M.A. 1991) (citing *United States v. Evans*, 27 M.J. 34, 39 (C.M.A. 1988), *cert. denied*, 488 U.S. 1011, 109 S.Ct. 797, 102 L.Ed.2d 788 (1989)).

In the case before us, an immediate instruction would have cured any possible error.[9] The military judge offered to give an immediate instruction to disregard his comments, but at appellant's request, did not do so. By requesting that no instruction be given, appellant waived the issue. *See United States v. Wray*, 9 M.J. 361 (C.M.A. 1980). Notwithhstanding the appellant's waiver, later, during instructions before findings, th military judge instructed the court members to disregard his comments, statements or gestures. "Absent evidence to the contrary, a jury is presumed to have complied with the judge's instruction." *Balagna*, 33 M.J. at 56-57 (citations omitted). The military judge did not abuse his discretion in deying a mistrial.

Appellant also alleges that a mistrial should have been granted because the military judge failed to recuse himself upon motion of defense for bias against appellant. This issue arose from appellant's request for expert psychiatric assistance. A Lieutenant Colonal (Dr.) W had been provided by the goverment, but defense contended he was inadequate. At an *ex parte* proceeding conducted with consent of the trial counsel, defense counsel disclosed to the military judge that Dr. W was inadequate because he refused to be a defense advocate, believed he should be neutral in providing advice to appellant, and felt that appellant was "the sort of person you might want to execute." The military judge took steps to insure that appellant was provided an acceptable psychiatrist. Finally, Dr. Armitage, a forensic psychiatrist acceptable to the defense, was made available. During this

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[9] We doubt that the judge's conduct was error. This is not a case, such as *United States v. Wilson*, 2 M.J. 548 (A.C.M.R. 1976), a case cited by appellant, where the military judge essentially tried the case for the prosecution. Military judges should take care not to voice their frustrations, such as the military judge did here, when counsel repeatedly raise objections to matters upon which the military judge has already ruled.

process the following colloquy concerning trial dates and accountability for delays took place:

> TC: Your Honor, we're not—
> MJ: Well, look—
> TC: —opposing a defense delay, but I get the feeling that the government is being maneuvered here into somehow the defense saying, 'I'm not ready to go, we're going to need to evaluate a lot of different things; but somehow, it should all be accountable to the government.' And if it happens 90 days fall by, try to create an issue where there is no issue.
> MJ: Well, that's my perception exactly. Certainly, you fellows aren't trying to maneuver the system, are you? If you want delay, I'd be more than happy to give you delay. If you want time to check out these things, be my guest; take whatever time you feel is necessary. But in my view so far, the government has been extremely cooperative with you. If you want more time, as I say, just ask.[10]

Subsequently, the appellant challenged the military judge for

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[10] There was some confusion whether the military judge made comments at an Article 39(a), UCMJ, session or at an out of court session pursuant to Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 802 [hereinafter R.C.M.]. Although the use of R.C.M. 802 sessions has been expanded, the potential dangers of such sessions are exhibited by this case. Except for purely administrative matters, the use of R.C.M. 802 sessions should be discouraged. Matters which have even a remote possibility of becoming an appellate issue should be litigated on the record. In the case before us, appellant alleges statements made by the military judge at the 802 sessions exhibited his bias and prejudice against defense counsel. We have concluded from the record that those comments questioned by appellant took place at an Article 39(a) session and are part of the record of trial.

cause, bias, and prejudice against counsel for the defense. The military judge denied the motion.

Appellant urges the application of the liberal standard applied to challenge of court members to the challenge of the military judge. We believe we should apply a different standard. There is a substantial burden on the defendant to prove that a judge is not impartial. *United States v. Martinez,* 19 M.J. 652 (A.C.M.R. 1984). "A 'judge has as much obligation not to recuse himself when there is no reason to do so as he does to recuse himself when the converse is true.' " *Martinez,* 19 M.J. at 653 (citing *United States v. Bray,* 546 F.2d 851, 857 (10th Cir. 1976)). In the case before us, we find that the military judge was impartial and was not biased toward defense counsel. Indeed, he insured appellant had an acceptable expert and made many rulings in favor of appellant. We do not interpret his question of "Certainly, you fellows aren't trying to maneuver the system, are you?" as any indication of bias or, as contended by the defense; as an attack upon counsel's ethical conduct. *See United States v. Elzy,* 25 M.J. 416 (C.M.A. 1988). We find no abuse of discretion and no error in the refusal of the military judge to grant appellant's challenge against him.

We find no cumulative error to support appellant's contention that failure to grant the motion resulted in an unfair trial. We hold that the military judge did not abuse his discreton in denying the motion for a mistrial. *See Jeanbaptiste,* 5 M.J. at 376.

III.

Appellant submits that the military judge erred in failing to grant a motion for change of venue because of media coverage; or, in the alternative the military judge erred in failing to sequester the panel members. At trial, appellant requested a change of venue to a place such as Fort Huachuca, Arizona, because the case received state and notional publicity. In denying the motion the military judge made the following findings:

> One, the press has reported fairly and responsibly on this trial. Two, the stories have not created a shrill or hostile atmosphere for this trial. Three, the stories for the most part have been accurate, with a few minor exceptions cited by the defense. Any racial issues have not be injected by the press. Nevertheless, efforts have been made to ensure that the court members, named in the orders, have as little exposure to pretrial publicity as possible. Those efforts have included: One, obtaining members not assigned to the 1st . . . Cavalry Division. Two, obtaining members assigned to Fort Hood well after the dates of the alleged incidents. Three, obtaining members from Fort Sill, Oklahoma, an installation hundreds of miles from Fort Hood. Four, an order issued by me on 31 January 1989, directing potential members to refrain from reading, listening to, or viewing any accounts of this trial, or the alleged incidents involved. And five, a previous ruling, allowing individually-sequestered voir dire.

After extensive voir dire of court-members, to include the issue of pretrial publicity and prior knowledge, nine members indicated they saw one newspaper article concerning the offense and five indicated they had seen references to the case on television. After the extensive voir dire, no reason was disclosed upon which to base a challenge for cause. Indeed, none of the members were challenged for cause by appellant because of media publicity or knowledge of the case.

Where an accused can demonstrate that the court would be adversely influenced by an atmosphere of hostility or partiality against him at place of trial, he is entitled to be tried in a different place. *United States v. Nivens,* 45 C.M.R. 194, 197 (C.M.A. 1972). "A change in the place of trial may be necessary when there exists so great a prejudice against the accused that he cannot obtain a fair and impartial trial." R.C.M. 906(b)(11) discus-

sion. As stated in *United States v. Smith*, 1 M.J. 1204, 1207-08 (N.C.M.R. 1977),

> Proof that a particular case has been widely publicized, standing by itself does not establish that a court-martial has been influenced by such publicity. Further, the mere fact that court-martial members have heard or read about the case they are assigned to try, standing alone, is not a sufficient basis for a change of venue so long as the members will not be influenced by what they have heard or read.

(citations omitted):

In the case before us, we find that there was no atmosphere of hostility surrounding the court-martial. Further, the military judge took appropriate measures to ensure the members remained free from possible external influence. As a result, we are satisfied that the court members decided the case based upon what was properly presented to them during the trial. *See United States v. Garwood*, 20 M.J. 148, 152 (C.M.A.), *cert. denied;* 474 U.S. 1005, 106 S.Ct. 524, 88 L.Ed.2d 456 (1985). We find that appellant was tried by a fair and impartial court. The military judge properly denied the motions for change of venue and sequestration of the members.

IV.

Appellant asserts that the military judge improperly denied a defense motion to have the members ignore a portion of the government argument requesting that the members vindicate society's victims. Appellant's objection relates to the following argument by trial counsel on sentence:

> What the defense has glossed over in their entire argument is justice. What sentence serves justice? Crimes, when they're committed, demand punishments that fit them. The message that you send out, and you will

> send out a message with your sentence today, that message is not going to go just over this installation, but it is going to go across the United States. There's going to be a message that's going to be heard by working people. They need to know that they will not be terrorized in their work places. Americans, members of society, need to know that they will be protected and that they will be protected and that we will protect and we will vindicate society's victims.

Trial defense counsel objected to the argument. The military judge overruled the objection. The military judge instructed the court to consider evidence in aggravation and mitigation. He also instructed the court on the sentencing factors of protection of society from the wrongdoer, punishment of the wrongdoer, rehabilitation of the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his crime. Trial defense counsel objected to the instruction claiming specific deterrences should be prohibited.

Before this Court, appellant contends that trial counsel improperly argued general deterrence, citing *United States v. Mosely*, 1 M.J. 350 (C.M.A. 1976). In *Mosely*, Judge Cook, writing for the Court, held that, "as applied to the accused, therefore, consideration of [specific] deterrence in assessment of a just sentence is consistent with the concept that the sentence should be individualized, that is, predicated on factors relevant to the accused." *Id.* at 351. He held, however, that it was error for the trial counsel to argue general deterrence. *Id.* The court withdrew from this view in *United States v. Lania*, 9 M.J. 100 (C.M.A. 1980). The Court held that general deterrence is a relevant factor in determining a just sentence within the maximum limits prescribed and can be argued by the trial counsel, provided the military judge instructs the court there are other factors such as rehabilitation of the accused, and admonishes the

court members that they must take into account the circumstances of the case and the character and propensities of the accused.[11] *Id.* at 104.

In the case before us, tthe military judge properly instructed the court members to take into account the circumstances of the case and the character and propensities of the accused. The trial counsel's argument did not invite the members to rely on deterrence to the exclusion of other factors. *See United States v. Thompson*, 9 M.J. 166 (1980). The trial counsel's argument was not improper. The military judge correctly overruled the objection.

V.

Appellant asserts that the record before us is insufficient to satisfy the requirement for a verbatim record.

At trial, the military judge gratuitously invited trial defense counsel to make an opening satement during the sentencing proceedings.[12] The court recessed before the "opening statement"

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[11] Judge Cook, who authored *Mosley*, concurred in the disposition of *Lania*. In his concurrence he stated:

> I have expressed that view in a number of cases, but see no purpose in continuing its reiteration in the face of the Court's withdrawal from *United States v. Mosely*, 1 M.J. 350 (C.M.A. 1976). I therefore, do not now, and will not henceforth, raise objection to arguments by trial counsel for a more severe sentence than might otherwise be adjudged because increased severity may be thought, by the court members, to deter others from committing the same offense.

Lania, 9 M.J. at 105.

[12] Military criminal trials are bifurcated, i.e., a proceeding before findings of guilty or verdict and a presentencing proceeding. Although an opening statement is normal at the beginning of trial on the merits, this Court is unaware of any other military case where an opening statement was permitted during presentencing proceedings. We need not determine the propriety of adding this additional but unrequested opening statement. In our view, however, the better practice is to follow established procedure.

could be presented by the trial defense counsel. The court was called to order and the "opening statement" on sentencing was presented. Trial defense counsel requested a sidebar conference and this colloquy followed:

> DC: Your Honor, the tape didn't—didn't catch the opening statement part—
> RPTR: I was in the restroom, Your Honor. I didn't know—
> MJ: What?
> DC: He was in the restroom, so he didn't get that. But it was—it was short—we don't think there was any error in that. It was a very short statement, and we don't see that as any serious error, but I thought we ought to bring it up at this time.
> MJ: I didn't even notice.
> DC: I didn't either.
> MJ: Don't do that again, will you?
> RPTR: I just went to the bathroom, and—
> MJ: Yeah, I know, but don't do it again.
> DC: I just thought we ought to do—say something on the record.
> DC: I can recreate it verbatim, almost, and that—to the defense's satisfaction, Your Honor.
> DC: Yeah.

The record reflects that the court reporter was absent two minutes. Trial defense counsel provided a text of his opening statement in writing which is attached to the record as an appellate exibit.

Appellant urges that this Court adopt a bright line rule requiring a verbatim record such as that adopted by the Navy court in *United States v. Alston*, 30 M.J. 969 (N.M.C.M.R. 1990). The facts of *Alston* are far from the facts in the case before us. In *Alston*, only those parts of the record pertaining to the offense

of which appellant was convicted were transcribed. Government counsel maintained that the other parts were insubstantial. The court held that the record was not verbatim. *Id.* at 971.

A record of trial in a case such as the one before us must include a verbatim transcript of all sessions except sessions closed for deliberations and voting. *See* R.C.M. 1103(b)(2)(B). "A verbatim transcript includes sidebar conferences, arguments of counsel, and rulings and instruction by the military judge." R.C.M. 1103(b)(2)(B) discussion. Failure to comply with the rule does not necessarily require reversal but raises a presumption of prejudice which the government may rebut. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1103(b)(2) analysis, app. 21, at A21-70. *See United States v. Eichenlaub,* 11 M.J. 239 (C.M.A. 1981). An omission must be substantial to raise the presumption. *United States v. Gray,* 7 M.J. 296, 297 (C.M.A. 1979); *see United States v. Nelson,* 13 C.M.R. 38 (C.M.A. 1953). Conversely, insubstantial omissions do not change a record's characterization as a verbatim transcript. *United States v. McCullah,* 11 M.J. 234, 236 (C.M.A. 1981); *United States v. Donati,* 34 C.M.R. 15 (C.M.A. 1963). Therefore, reconstruction by trial counsel without defense participation of twenty-four pages of the testimony from five defense witnesses and proceedings on a motion for mistrial which originally consisted of about eighty pages has been held to be a substantial omission. *United States v. Boxdale,* 47 C.M.R. 351 (C.M.A. 1973). On the other hand, reconstruction of a prosecution witness' testimony at an Article 39(a) session with all parties present has been held to be sufficient. *United States v. Lashley,* 14 M.J. 7 (C.M.A. 1982).

In the case before us, we find that the omission of a two-minute opening statement at the beginning of the sentencing procedures by trial defense counsel was not substantial. Trial defense counsel continued to present his evidence and placed his position concerning sentencing before the court during argument.

Even assuming the omission was substantial, trial defense counsel's assurance to the military judge that he could reconstruct his statement "verbatim almost," and his reconstruction, which is attached to the record as an appellate exhibit, convinces this Court that the record is substantially verbatim. The requirements of the Manual for Courts-Martial and the Uniform Code of Military Justice have been satisfied and any possible presumption of prejudice has been overcome. *See Lashley,* 14 M.J. at 9.

VI.

Appellant alleges that the death penalty provision of Article 118, UCMJ, is unconstitutional as it relates to traditional common law crimes that occur in the United States during time of peace. Appellant's claim is that the death penalty provision of Article 118 is an improper invasion of state interests protected by the tenth amendment to the Constitution and exceeds the requirements of the necessary and proper clause. The constitutionality of the peacetime prosecution of offenses under the military murder statute was upheld in *United States v. Schafer,* 32 C.M.R. 83 (C.M.A. 1962). We believe the reasoning in *Schafer* is similarly applicable to this case:

> Thus, in the case of an accused serving in the armed forces, there is no merit to the defense argument insofar as it is predicated on drawing a distinction as to peacetime offenses. *See also Ex parte Milligan* [71U.S.] 4 Wall. 2, 124, 141, [18 L.Ed. 281] (U.S. 1866). And neither, of course, can the locus of the crime, nor the penalty therefor, make any difference, for those amenable to military justice under Article 2 of the Code, 10 U.S.C. § 802, are subject thereto in all places under the clear extraterritorial applicability prescribed for the Uniform Code in Article 5 thereof, 10 U.S.C. § 805. As the Supreme Court of the United

States recently held in *Kinsella v. United States*, 361 U.S. 234, 4 L.Ed.2d 268, 80 S.Ct. 297 (1960):

"The test for jurisdiction, it follows, is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'

. . . .

'[T]he power to 'make Rules for the Government and Regulation of the land and naval Forces' bears no limitation as to offenses. The power there granted includes not only the creation of offenses but the fixing of the punishment therefor. If . . . [the accused] are included in the term 'land and naval Forces' at all, they are subject to the full power granted the Congress therein to create capital as well as noncapital offenses.'[13]

Shafer, 32 C.M.R. at 85-86.

The assertion of error is without merit.

VII.

Appellant challenges the peremptory challenge procedure in the military justice system, contending that it allows the government to remove any one juror without cause and constitutes an unconstitutional violation of the fifth and eighth amendments in capital cases. Appellant further contends that a premptory challenge permits the prosecutor to remove a member whose moral bias against the death penalty does not justify a challenge for cause. Although appellant makes this broad assertion, his argument is not directed at death penalty cases specifically, but at the peremptory challenge procedure in general. He contends that the convening authority selects the "best qualified" to sit as court

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[13] This view has been reinforced by *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987).

members and that the one peremptory challenge is to remove any lingering doubt about a member's fitness to serve. Appellant uses as an example a situation where a defense challenge for cause is denied and the issue is closely decided. He contends that only then is a peremptory challenge proper. But where a peremptory challenge is made by the government without first challenging the member for cause, he contends no valid basis exists for the member's removal from the court. Appellant cites no authority for the unique conclusion.

Article 41(b), UCMJ, provides that "Each accused and the trial counsel is entitled to one peremptory challenge, but the military judge may not be challenged except for cause." No reason is necessary for a peremptory challenge. R.C.M. 912(g)(1) discussion.[14]

At common law, unlimited peremptory challenges were exercised by the Crown and the defendant was allowed a limited number.[15] Originally, peremptory challenges may have been allowed only in capital felonies. *See Swain*, 380 U.S. at 212 n. 9, 85 S.Ct. at 831 n. 9. "The persistence of peremptories and their extensive use demonstrate the long and widely held belief that the peremptory challenge is a necessary part of trial by jury." *Swain*, 380 U.S. at 219, 85 S.Ct. at 835. It has been said that the peremptory challenge is an arbitrary and capricious right which must be exercised with full freedom or it fails in its purpose. *Lewis v. United States*, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). "Although historically the incidence of the prosecutor's challenges has differed from that of the accused,

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[14] This provision has been limited by *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989); *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988).

[15] For a history of the peremptory challenge see *Swain v. Alabama*, 380 U.S. 202, 212-217, 85 S.Ct. 824, 831-834, 13 L.Ed.2d 759 (1965). In citing *Swain*, we recognize the limitations placed upon the case by *Batson*.

the view in this country has been that the system should guarantee not only freedom from any bias against the accused, but also from prejudice against the prosecution." *Swain*, 380 U.S. at 220, 85 S.Ct. at 835. In the case before us, we find that the trial counsel's peremptory challenge served that very purpose. We hold that the prosecution's peremptory challenge did not violate the Constitution.[16]

VIII.

Appellant next asserts that R.C.M. 1004 violates his fifth amendment right to equal protection by subjecting him to the death penalty for an offense which is not punishable by death under the federal criminal code. This Court addressed this issue in *United States v. Murphy*, 30 M.J. 1040, 1055-1056 (A.C.M.R. 1990) (en banc), holding that an accused was not deprived of equal protection by virtue of his status in the armed forces. We see no valid reason to reject our prior holding on this issue. Appellant's assertion of error is without merit.

IX.

Appellant contends that due process requires that trial and intermediate appellate judges in a peacetime military death case have the protection of a fixed term of office.

No published case by this Court has addressed this issue.[17] In

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[16] In *Hayes v. Missouri*, 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed. 578 (1887), the Supreme Court rejected a constitutional challenge under the equal protection clause to the prosection's peremptory challenge. The Court stated, "The right to challenge is the right to reject, not select a juror. If from those who remain, an impartial jury is obtained, the constitutional right of an accused is maintained.' *Id.* at 71, 7 S.Ct. at 352. In the case before us, adopting appellant's contention would provide him a partial court—partial in his favor.

[17] The issue of fixed terms of office has been addressed by this Court in an unpublished opinion, which held there was no requirement for a fixed term for judges in the military and thus no due process violation. *United States v. Durham*, CM 446440 (A.C.M.R. 1986) (unpub.), *petition denied*, 24 M.J. 126 (C.M.A. 1987). The Navy-Marine Corps Court of Military Review has subsequently reached the same conclusion. *United States v. Graf*, 32 M.J. 809 (N.M.C.M.R. 1990).

obiter dictm, the Supreme Court stated in *Palmore v. United States*, 411 U.S. 389, 404, 93 S.Ct. 1670, 1679, 36 L.Ed.2d 342 (1973):

> Under its . . . power '[t]o make Rules for the Government and Regulation of the land and naval Forces,' Congress has declared certain behavior by members of the Armed Forces to be criminal and provided for the trial of such cases by court-martial proceedings in the military mode, not by courts ordained and established under Article III. Within their proper sphere, courts-martial are constituted to carry out congressional and executive will. *Dynes v. Hoover*, [61 U.S.] 20 How. 65, 79, 82 [15 L.Ed. 838] (1857). . . . [T]he Constitution does not provide life tenure for those performing judicial functions in military trials. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17, 76 S.Ct. 1, 5 100 L.Ed. 8 (1955).

Although the establishment of a fixed term of office for those performing military judicial functions may be desirable, it is not a Constitutional requirement, but is a policy matter to be determined by the President, Congress, or each military service.

X.

Upon sentencing appellant, the court members unanimously found the following three aggravating factors:

> The premeditated murder of Bobby Gene Sharbino was comitted while the accused was engaged in the com-

mission or attempted commission of a robbery.

Having been found guilty of the felony murder of Christopher Fay, as set forth in Specification 3 of Charge I, the accused was the actual perpetrator of the killing.

Having been found guilty of premeditated murder of Bobby Gene Sharbino, the accused was also found guilty of another violation of Article 118, UCMJ, in the same case.

The court members also announced that they unanimously found any extenuating and mitigating circumstances were substantially outweighed by any aggravating circumstances. Accordingly they sentenced appellant, *inter alia,* to be put to death.

In accordance with our obligation under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we have independently weighed the evidence and agree with each of the aggravating factors found by the court-martial, i.e., that the premeditated murder of Bobby Gene Sharbino, in violation of Article 118(1), UCMJ, was committed while appellant was engaged in a robbery (R.C.M. 1004(c)(7)(B)); that in the felony murder of Christopher Fay, a violation of Article 118(4), the appellant was the actual perpetrator of the killing (R.C.M. 1004 (c)(8)); and that appellant was found guilty in the same case of another violation of Article 118 (R.C.M. 1004 (c)(7)(J)). We find that each aggravating factor in this case, standing alone, is sufficient to authorize the death penalty. *United States v. Curtis,* 33 M.J. 101, 108 (C.M.A. 1990). Accordingly, we do not find that the number of aggravating factors affected the court members willingness to impose the death sentence. *See id.* We also find that any extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances.

In accordance with *Curtis,* we are required to conduct a limited proportionality review using *generally* similar cases reviewed by the Supreme Court of the United States in which state courts

have imposed the death penalty for like crimes. 33 M.J. at 109. We have examined a number of those cases and have concluded that the sentence is generally proportional to those imposed by other jurisdictions in similar situatons.[18] We also conclude that the sentence is appropriate for the crimes of which the accused stands convicted.

XI.

In a supplemental assignment of error, appellant alleges that the military judge erred in not permitting him to plead guilty or enter into a confessional stipulation to the robberies of the murder victims. A reading of the record reveals that appellant raised this issue in motions regarding referral of the charges to trial and multiplicity. In regard to the multiplicity motion, appellant initially offered to admit to the fact in an attempt to counter trial counsel's argument that exingencies of proof required multiplicious pleading. Subsequently, appellant decided, however, "to hold our water" on the offer. In regard to the confessional stipulation, that issue became moot when trial counsel steadfastly refused to enter into such a stipulation. The question of whether appellant could plead guilty was also discussed just prior to pleas. The cause of this discussion was case law which held that, under Article 45(a), UCMJ, 10 U.S.C. § 845(a),[19] an accused could

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[18] A computer search was used to examine cases reviewed by the Supreme Court since the reinstatement of the death penalty following *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Among the cases examined were *Boyde v. California,* 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990); *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); *Clemons v. Mississippi,* 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); *Blystone v. Pennsylvania,* 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990); and *Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

[19] Article 45(a), UCMJ, precludes an accused from entering a plea of guilty to any offense for which the death penalty may be adjudged.

not plead guilty to robbery and unpremeditated murder, even when charged in separate specifications and even when felony murder was not charged. *See United States v. Dock*, 28 M.J. 117, 118 (C.M.A. 1989).

Unlike *Dock*, appellant here complains he was precluded from pleading guilty. A reading of the record reveals that appellant did not attempt to enter pleas of guilty to any offense. Although he could have entered pleas of guilty to some offenses, he elected not to do so, as was his right. It appears from the record that appellant's strategy at trial was to plead not guilty, put the goverment to its proof, and attempt to shift the blame for the offenses to Nadia. Appellant's complaint at trial seemed to have been that he was deprived on sentencing of the instruction that a plea of guilty is the first step toward rehabilitation. Addressing this issue, the military judge offered to instruct the court that appellant was precluded from pleading guilty to capital offenses by law. Appellant assented to the offer, *sub silentio*. The military judge so instructed the court. Appellant must have been satisfied with the instruction because he did not object to it. Having selected this strategy, appellant should not be heard to complain of it. Even assuming error, appellant was not prejudiced, for he received the best of both worlds—he pleaded not guilty and the members received an instruction which left the impression that he really wanted to plead guilty but could not because of the law. We find the assignment of error without merit.

Other assertions of error, to include those raised personally by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), are without merit. The findings of guilty and the sentence are affirmed.

Judges HAESSIG and ARKOW, concur.

APPENDIX D

U.S. ARMY COURT OF MILITARY REVIEW

ACMR 8901123

UNITED STATES, APPELLEE,

v.

PRIVATE E1 DWIGHT J. LOVING, 065-56-0228,
UNITED STATES ARMY, APPELLANT.

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15 April, 1992

Accused was convicted by general court-martial, S.V. Saynisch, J., of premeditated murder, felony-murder, attempted murder, and robbery. On reconsideration of prior decision, 34 M.J. 956, the United States Army Court of Military Review, De Giulio, Senior Judge, held that: (1) accused was not denied effective assistance of appellate counsel; (2) trial defense counsel's decision not to present voluntary intoxication or lack of mental responsibility defense was matter of trial strategy; and (3) accused had no right to appellate defense counsel of particular rank.

Petition for reconsideration denied.

For Appellant: Captain Emmett G. Wells, JAGC (argued), Captain James M. Heaton, JAGC (on brief).

For Appellee: Major Joseph C. Swetnam, JAGC (argued), Lieutenant Colonel Daniel J. Dell'Orto, JAGC (on brief).

Before De GIULIO, HAESSIG, and ARKOW, Appellate Military Judges.

OPINION OF THE COURT ON PETITION FOR RECONSIDERATION

De GIULIO, Senior Judge:

Appellant was tried by a general court-martial composed of officers. Contrary to his pleas, he was found guilty of premeditated murder, felony murder, atempted murder, and four specifications of robbery, in violation of Articles 118, 80, and 122, Uniform Code of Military Justice, 10 U.S.C. §§ 918, 880, and 922 (1982) [hereinafter UCMJ]. He was sentenced to death, a dishonorable discharge, and forfeiture of all pay and allowances. On 3 February 1992, this court issued an opinion affirming the findings of guilty and the sentence. *United States v. Loving*, 34 M.J. 956 (A.C.M.R. 1992).

On 24 February 1992, appellantt filed a Petition for Reconsideration and Suggestion for Reconsideration *En Banc*. In that document, it is asserted that the proportionality review in this Court's opinion of 3 February 1992 should be reconsidered, that appellant was denied effective assistance of appellate counsel, and that appellant was denied equal protection of the law. On 24 February 1992, appellant also moved to file a second supplemental assignment of error.[1] In this supplement, appellant asserts that trial defense counsel were ineffective in failing to present the defense of voluntary intoxication and in failing to present evidence on the merits or at sentencing concerning appellant's mental condition. The second supplemental assignment of error was considered by this Court when deciding whether the Suggestion for Reconsideration *En Banc* should be adopted. Appellant's Suggestion for Reconsideration *En Banc* was not adopted by the Court. *United States v. Loving*, ACMR 8901123 (A.C.M.R. 5 Mar. 1992) (notice) (unpub).

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[1] The first Supplemental Assignment of Error was considered in this Court's opinion of 3 February 1992.

Now before this panel for disposition are the assertions made in the Petition for Reconsideration and the second Supplemental Assignment of Error. We treat all assertions of error as part of the Petition for Reconsideration. We find no merit to the assertions and deny the petition.

I.

Pursuant to *United States v. Curtis*, 33 M.J. 101, 109 (C.M.A.), *modifying* 32 M.J. 252, 271 (C.M.A. 1991), this Court conducted a proportionality review of the death penalty imposed in appellant's case. 34 M.J. at 969. Appellant asserts that this Court should reconsider the proportionality review to ensure a more thorough and accurate assessment of the appropriateness of the death penalty in this case, to apprise appellant more fully of the basis of this Court's decision in order to afford him sufficient information for further appellate review, and establish standards and guidelines for proportionality review in general. We believe our proportionality review has been thorough, has been accurate, and satisfies the requirement set forth in *Curtis*.

II.

Appellate defense counsel also asserts that appellant has been denied effective assistance of appellate counsel.[2] He points to the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) [hereinafter ABA Guidelines]. Appellate defense counsel also points to *United States v. Curtis*, 31 M.J. 395 (C.M.A. 1990) (interlocutory order), where he contends that the Court of Military

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[2] Appellate defense counsel also moved to withdraw from the case. In that motion, he noted that appellant was "advised of the implications of continued representation by [appellate defense counsel], and has no objection to such continued representation." The motion to withdraw was denied by this Court.

Appeals ordered the Navy to provide $15,000 "to secure services of death qualified counsel." This Court rejected similar claims in *United States v. Gray,* 32 M.J. 730 (A.C.M.R.), *writ appeal denied,* 34 M.J. 164 (C.M.A. 1991), holding that the ABA Guidelines are not binding on the military.[3] A similar contention concerning the position that funds were required for death qualified counsel was also rejected. *Id.* at 734.

In an affidavit submitted to this Court, appellate defense counsel states his belief that he had inadequate time to prepare for the review of appellant's case after he agreed to his assignment to the case in June 1991, that his caseload was too heavy, that he was unable to find time to attend "continued legal education of my choice on capital litigation," that he had not read the record in November 1991 when oral argument was scheduled for 9 December 1991,[4] and that he failed to raise the issue of ineffective assistance of defense counsel concerning mental responsibility.[5]

Appellate defense counsel are held to the same standard of competency as trial advocates. *United States v. Hullum,* 15 M.J. 261, 267 (C.M.A. 1983). In testing for ineffective assistance of counsel, it must be shown that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *United States v. Scott,* 24 M.J. 186 (C.M.A. 1987).

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[3] A similar claim was rejected in *United States v. Thomas,* 33 M.J. 768 (N.M.C.R. 1991).

[4] It is noted that oral argument was requested by the same counsel on 29 October 1991. No request was made by counsel to delay oral argument. Counsel did not oppose, however, a request by government appellate counsel to reschedule oral argument. Government appellate counsel's request was denied.

[5] This issue has been raised before this Court and will be discussed in this opinion.

In considering this issue, we note:

1) that appellate defense counsel has represented numerous appellants before this Court, filed numerous pleadings and presented numerous oral arguments.

2) that appellate defense counsel has the reputation of being one of the most able counsel in the Army Defense Appellate Division. His practice before this Court is consistent with that reputation.

3) that in appellant's case, appellate defense counsel utilized an excellent brief. In addition, he requested oral argument, requested extension of time for oral argument, filed supplemental citations, ably argued before the Court twice, suggested reconsideration *en banc*, petitioned for reconsideration of this Court's decision, and filed two supplemental assignments of error.

4) that in his practice before this Court, appellate defense counsel has shown that his knowledge, training, and experience in military criminal law place him well within the group qualified to represent those accused of capital crimes.

We conclude that counsel's representation of appellant before this court has not been deficient. *See Strickland,* 466 U.S. 668, 104 S.Ct. 2052.

III.

Appellant also alleges that his trial defense counsel were ineffective because they failed to present the defense of voluntary intoxication and evidence of appellant's mental condition on the merits or at sentencing.

Affidavits submitted by the trial defense counsel[6] reveal that

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[6] At an in-chambers hearing before this Court, Government appellant counsel indicated that the lead trial defense counsel continued to assist ap-

the option of presenting voluntary intoxication was carefully considered by the defense team. Counsel concluded that such a defense was inconsistent with the evidence and their overall defense strategy. Because of the strong evidence against appellant, the defense strategy was to convince the court that the death penalty should not be imposed. Throughout the trial, the defense maintained that appellant's girlfriend manipulated him into committing the offenses. Except for appellant's prospective testimony, there was no evidence of any significant drug or alcohol abuse during the offenses. It was concluded that evidence of voluntary intoxication would have to come from appellant who in practice sessions proved to be a very poor witness. Counsel concluded that appellant's testimony would do more harm than good. In addition, the defense expert psychiatrist, a member of the defense team, was not supportive of the use of the voluntary intoxication defense. Finally, appellant decided that he would not testify.

As to appellant's mental responsibility, the affidavits reveal that the defense expert psychiatrist was extremely adverse to this defense after interviewing appellant on several occasions and reviewing all documents regarding appellant's mental status. He concluded that presentation of the defense would not be successful and would only open the door to evidence that appellant had the type of personality that could easily commit similar crimes in the future. The defense team made a concerted effort to keep this evidence from the court members believing it would encourage a capital sentence—a result their strategy was trying to avoid.

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pellant in his appeal and that he was reluctant to provide an affidavit. After this court ascertained that the allegations applied to all three trial defense counsel, counsel were released from their privilege concerning this matter. *United States v. Loving,* ACMR 8901123 (A.C.M.R. 27 Feb. 1992) (interlocutory order) (unpub). Even in his subsequentt affidavit the lead trial defense counsel continues to advance arguments in appellant's defense.

As previously stated in this opinion, the standard to be applied in testing for ineffective assistance of trial defense counsel is that set forth in *Strickland v. Washington.* Appellant must overcome the strong presumption that the challenged acts were trial strategy. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. Deference must be given to counsel's tactical judgment during trial, and our judgment with the benefit of hindsight should not be substituted. *United States v. Bono,* 26 M.J. 240, 242 (C.M.A. 1988).

In the case before us, counsels' conduct of the defense was carefully planned. It was developed after considering input from the defense expert psychiatrist who examined the appellant, provided the defense team the benefit of his professional judgment, participated in trial preparations, and sat at the defense table at trial. It is clear to this Court that the determination not to present appellant's mental condition on either findings or sentence was carefully considered tactics and strategy. Giving deference to trial defense counsels' tactical judgment, we hold that their performance was not deficient. Appellant was not denied effective assistance of counsel.[7]

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[7] Appellate defense counsel moved to hold the 3 February 1992 decision in abeyance and required discovery of information on appellant's mental condition pending receipt of that information. That motion was denied. *United States v. Loving,* ACMR 8901123 (A.C.M.R. 3 Feb. 1992) (order) (unpub). In denying that motion, this Court reviewed information concerning appellant's mental responsibility and determined that the issue was not raised on appeal. During oral argument appellate defense counsel informed this Court that he had obtained the requested information. Although not specifically asserted as an error before this Court, we have examined the information submitted with the supplemental assignment of error relating to appellant's mental condition. We have again concluded that the issue of appellant's mental responsibility has not been raised on appeal. *See United States v. Lilly,* 25 M.J. 403 (1988); *United States v. Triplett,* 21 U.S.C.M.A. 497, 45 C.M.R. 271 (1972).

IV.

Finally, appellant alleges that he was denied equal protection of the law. His argument is that the Navy and Marine Corps defense appellate agency has assigned appellate counsel in the grade of major in one death penalty case and lieutenant commander in another. One appellant also has civilian counsel retained at goverment expense.[8] He also alleges that in each case military counsel is completely free of all other assigned cases and represents a single client. He concludes that appellants who are sentenced to death and who are members of other branches of the service are much better represented than those in the Army. With no citation to authority, he concludes that "[t]his is a blatant violation of the due process and equal protection guarantees of the Constitution." We disagree.

An accused has no right to select military appellate defense counsel. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1202 discussion. An accused is entitled to be represented by appellate defense counsel when requested by the accused, when the United States is represented by counsel, or when the Judge Advocate General has sent the case to the Court of Military Appeals. UCMJ art. 70(c), 10 U.S.C. § 870(c). Under that statutory provision, counsel "must be a judge advocate who is a graduate of an accredited law school or is a member of a Federal court or highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State." UCMJ art. 27(b)(1), 10 U.S.C. § 827(b)(1). In the case before us, appellate defense counsel meets those qualifications.[9] So long as appellate defense counsel meets those legal qualifications, there is no right to counsel of particular rank or particular abilities. *Cf.* Dep't of Army, Pam. 27-173, Trial Procedure, para.

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[8] See discussion in part II of this opinion.

[9] Of course, counsel must be competent. See Part II of this opinion.

5-3 (20 April 1990); Manual for Courts-Martial, United States, 1984, Rules for Court-Martial 502(d)(1) Analysis, app. 21 at A21-25 (rule of eqivalency is not necessary where counsel are legally qualified). We recognize that the Equal Protection Clause of the fourteenth amendment applies to the armed forces through the Due Process Clause of the fifth amendment subject to certain exceptions necessitated by conditions of military service. *See Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). Congress has sanctioned distinctions between treatment of personnel in various services. *See United States v. Hoesing*, 5 M.J. 355 (C.M.A. 1978). Uniformity is not required among the services, and lack of uniformity is not necessarily a violation of equal protection. *Id.* Assignment of appellate defense counsel by each of the services falls within this category. We hold appellant was not denied equal protection of the law.

After careful review of appellant's assertions, to include the supplemental assignment of error, the Petition for Reconsideration is denied.

Judge HAESSIG and Judge ARKOW concur.

APPENDIX E

U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

NMCM 87-3856

UNITED STATES

v.

RONNIE A. CURTIS, 511-74-5202, LANCE CORPORAL (E-3),
U.S. MARINE CORPS.

Sentence Adjudged 6 Aug. 1987.
Decided 30 June 1989.

Accused, a lance corporal in the United States Marine Corps, was convicted by general court-martial convened at Camp LeJeune, North Carolina, Sabastian Gaeta, Jr., J., of homocide and sentenced to death and he appealed. The United States Navy-Marine Corps Court of Military Review, Strickland, J., held that: (1) procedures of the Rules for Courts-Martial for imposition of death sentence were properly promulgated; (2) delegation of power to the President to promulgate the rule was not unconstitutional; (3) trial counsel presented racially neutral explanation for preemptory challenge directed to one member; (4) death penalty was appropriate; and (5) it is not a denial of the equal protection to provide death penalty for service members while not providing for civilians.

Affirmed.

BYRNE, C.J., filed an opinion concurring in part and dissenting in part.

ALBERTSON, J., filed an opinion concurring in part and dissenting in part.

LCDR L. Saccoccio, JAGC, USN, Appellate Defense Counsel.

LT. Scott A. Hagen, JAGC, USNR, Appellate Government Counsel.

Capt. Thomas D. Miller, USMC, Appellate Government Counsel.

Before the Court En Banc.

STRICKLAND, Judge:

Appellant was tried at Camp Lejeune, North Carolina, by a general court-martial composed of officer and enlisted members. Contrary to his pleas, he was found guilty of two premeditated murders, larceny, burglary, unlawful entry, indecent assault and damage to Government property in violation of Articles 118, 121, 129, 130, 134 and 108, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 918, 921, 929, 930, 934, and 908, respectively. Additionally, in accordance with his plea, he was convicted of disobeying a general order in violation of Article 92, UCMJ, 10 U.S.C. § 892. On August 6, 1987, Lance Corporal Curtis was sentenced to death. The convening authority approved the sentence as adjudged.

We determined that this case presented issues of exceptional importance and, thus, pursuant to Rule 17, Courts of Military Review Rules of Practice and Proceduure, decided to hear this case *en banc*.

Appellant raises seven allegations of legal error on appeal. We have carefully considered each assignment of error in this capital case and will discuss each *seriatim*. Having reviewed the

record pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866, we conclude that the assignments of error have no merit and that no prejudicial error was committed which affects the findings or sentence.

I.
STATEMENT OF FACTS

Appellant, Lance Corporal Ronnie A. Curtis, reported to 3d Battalion, 2d Marines, 2d Marine Division, Camp Lejeune, North Carolina, in January 1985 and was assigned duties as a supply administrative clerk. His officer-in-charge was First Lieutenant James F. Lotz, the battalion supply officer. With the exception of an overseas deployment, Curtis and Lieutenant Lotz worked together in the same office for the next two years.

During this time period, Curtis visited Lieuteant Lotz's quarters aboard Camp Lejeune on several occasions; once for a supply section barbecue and on other occasions to pick up or deliver items related to supply work. As a result, Curtis learned the specific location of Lotz's quarters and, in addition, met Lieutenant Lotz's wife, Joan, who was a school teacher at the high school aboard the base.

Also during this time frame, Curtis, who is black, formed the perception that Lieutenant Lotz was racially prejudiced. This was apparently the result of certain nicknames used by Lotz such as "Bebop Curtis" and "Curtis Blow"; certain imitations of blacks done by Lotz; and, what Curtis perceived to be a different attitude toward and treatment of black Marines in the office. Curtis' perception of prejudice was flatly refuted by black friends and acquaintenances of Lotz, including a young black man who lived with the Lotzs and was treated like a son. Nevertheless, it was this perception which apparently led Curtis to the events of April 13 and 14, 1987.[1]

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[1] Whether this perception was the actual or only motive for these killings is subjected to question. For example, on the night of the murders, Curtis complained to his roommate that Lotz had recently forbidden office personnel from playing games on the office computers, a practice that had previously been tolerated. He expressed his displeasure over this and it may explain the fact that while Curtis was stealing the knife from the supply building he threw his office computer to the floor.

April 13, 1987, was a normal day in the supply section with Curtis going to work at 0730 hours as usual. Lieutenant Lotz was not in the office on this particular day, either in the morning or in the afternoon. Curtis got off work at 1630 hours and proceeded to his barracks room where he and his roomate listened to music for the next several hours. They then purchased a bottle of gin and continued to listen to music and drink mixed drinks for several more hours. During this time, Curtis consumed approximately one pint of gin.

According to Curtis' confessions and testimony, he then went for a walk and began thinking of the things that had been going on in the office and began thinking about Lieutenant Lotz picking on him. As he stood outside of the supply building where he worked, Curtis decided that he needed to kill his officer-in-charge.

Curtis determined he would use a knife to carry out his plan and he broke into the supply building, picked the lock on the security cage and stole a Marine Corps K-Bar knife (a large knife with a seven inch blade). Prior to leaving he damaged the office computer by throwing it on the floor. Next, he went back to his barracks room and obtained a pair of gloves so that he would not leave any fingerprints at the Lotz house. Curtis then stole a bicycle for transportation and, while riding the 1.5 miles to the Lotz home, devised a scheme that he knew would get him inside the house.

Curtis arrived at the Lotz home sometime after midnight. He carried the knife concealed in the waistband of his pants. He left the bicycle in the backyard and went to the front door and knocked.

Within minutes, Lieutenant Lotz appeared at the door. Curtis acted anxious and told Lotz that another Marine member of the supply section had been in an automobile accident and needed help. Lotz immediately asked Curtis inside and prepared to call the military police. As Lieutennant Lotz picked up the phone to assist one of his Marines whom he believed to be injured, Curtis withdrew the K-Bar from his waistband and stabbed the Lieutenant in the chest. Lieutenant Lotz tried to place a chair between himself and Curtis and called to his wife. Curtis then stabbed Lotz a second time in the back.

Within moments Joan Lotz emerged from the bedroom with a blanket wrapped around her. She first went to her dying husband and then confronted Curtis, kicking him in the shin with her bare foot and asking what they had ever done to him. Curtis then began to attack Mrs. Lotz. As she pleaded with him to stop, he stabbed her seven times in the head, neck and back. Then, as she lay on the floor dying, Curtis ripped and cut off her panties and fondled her vaginal area.

Curtis then searched the house to determine if any other persons were present with the intent that he would kill anyone he found. He rummaged through the house taking car keys and money for gas. He wiped clean the knife he had used in the killings and left the house, taking one of the Lotzs' cars. This car, however, had a standard transmission and Curtis had difficulty driving it so he returned to the crime scene. He thereupon reentered the Lotz home, found some additional money, checked both bodies and left a second time taking their other car.

He drove around aimlessly for some period of time and ultimately decided to leave town. As he was traveling down the highway, Curtis momentarily fell asleep at the wheel and ended up crashing in the ditch. The state police arrived and, in the course of the accident investigation, Curtis admitted killing the Lotzs. He subsequently made several other confessions to these crimes.

II.
MILITARY JUDGE'S INSTRUCTIONS

Appellant's first assignment of error is that the military judge improperly instructed the members as to the voting procedures they had to utilize to adjudge the death penalty. The military judge instructed the members that two votes were required in order to adjudge the death penalty. He instructed that, first, they must unanimously find at least one of the aggravating factors existed beyond a reasonable doubt and, second, they must unanimously find the death penalty to be the appropriate sentence. Appellant argues that, in addition, the members should have been instructed to vote and unanimously find that any extenuating or mitigating circumstances were substantially outweighed by any aggravating factors. This error is without merit because we find that the military judge properly instructed the members in accordance with the requirements of Rule for Courts-Martial (R.C.M.) 1004, Manual for Courts-Martial (MCM), United States, 1984.[2]

This assigned error arises as a result of the wording in R.C.M. 1004(b)(4), MCM, 1984, which states:

> *Necessary findings:* Death may not be adjudged unless—
>
> (A) The members find that at least one of the aggravating factors under subsection (c) existed;
>
> (B) Notice of such factor was provided in accor-

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[2] The appellant does not challenge R.C.M. 1004, MCM, 1984, as a Constitutionally imperissible capital sentencing scheme. In our review of this case, we are satisfied that R.C.M. 1004, MCM, 1984, comports with the mandates of the Supreme Court that the members be required to make "an individualized determination on the basis of the character of the [accused] and the circumstances of the crime" and that the members "adequately differentiated this case in an objective, evenhanded, and substantively rational way" before imposing the death penalty. *Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

dance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and

(C) *All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances* admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule. (Emphasis added.)

Appellant asserts that in order for "all members [to] concur" as required by subsection (C), there must first be a vote in which all members unanimously find that the extenuating or mitigating circumstances are substantially outweighed by the aggravating circumstances. At trial, this same argument was made and the military judge, in denying appellant's request for this additional vote, indicated that "he [was] obligated to follow the procedures as set forth by the President." The military judge's ruling that this additional vote was not required is supported by the plain language of R.C.M. 1004(b)(7):

Voting. In closed session, before voting on a sentence, the members shall vote by secret writen ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

The subsection requires that only two votes be taken by the members and not the three requested by appellant. The last sentence of this subsection clearly speaks of the aggravating factor determination vote being followed by the sentence determination vote with no discussion or provision for an intermediate vote.

The absence of a requirement for a vote as to the balancing test does not relieve the members of their obligation to perform this test. It merely does not require that they memorialize the specific result. Appellant argues that without such memorialization there is no way to determine if all the members concurred that any extenuating or mitigating circumstances were substantially outweighed by any aggravating factors. We do not agree.

R.C.M. 1004(b)(6) requires that the military judge instruct the members as to the "requirements and procedures" they must use to adjudge a death sentence, including instructions regarding the balancing test. We believe the military judge's instructions were in compliance with this provision. In his instructions, the military judge outlines a three-step procedure to be followed before a death sentence could be adjudged. These involved a determination of whether an aggravating factor existed, application of the balancing test and a consideration of whether death was appropriate. With respect to step two the judge instructed, in pertinent part:

. . . [y]ou may not adjudge a senence of death *unless* you find that any and all extenuating or mitigating circumstances are substantially outweighed by any aggravating factors as you have found existed in the first step of this procedure. (Emphasis added.)

The military judge thereafter instructed with respect to step three: "A sentence of death may be adjudged only upon the unanimous vote of all the members."

In following the judge's instructions (given orally, with written copies provided to the members), the members could only have voted for death after first finding that the extenuating or mitigating circumstances were substantially outweighed by any aggravating circumstances. Thus, it is implicit in the recorded, unanimous vote for the death penalty that each member properly applied the balancing test. No further memorialization is neces-

sary. Therefore, we hold that the military judge properly instructed the members as to the number of votes which are required by R.C.M. 1004, MCM, 1984.

Included in this assignment of error is the allegation that the military judge overemphasized the requirement that the members were required to unanimously concur in finding an aggravating factor, but underemphasized the requirement that the members could not adjudge a death sentence unless they all first concurred in the finding that any extenuating or mitigating circumstances were substantially outweighed by any aggravating circumstances. Appellant argues that because the military judge instructed on the first requirement seven different times but only mentioned the second requirement once, the members did not fully and fairly evaluate the evidence but instead adjudged the death penalty in a meaningless manner. We disagree.

Merely mentioning one requirement more than another during instructions does not alone constitute error. There must also be some indication that this resulted in the members improperly performing their duties. There is no such indication in this case. To the contrary, all indications are that the members properly deliberated according to the judge's instructions. Not only did the military judge in this case orally instruct the members, he also provided them written copies of the instructions. If the members had any questions or were confused as to the instructions given by the military judge they could have referred to their copies for clarification. Furthermore, if the members were still confused or did not understand the instructions even after referring to their copies, then they could have requested further clarification from the military judge in open court. However, because the members did not request further clarification in open court and because they could easily refer to their copies of the instructions, we are convinced that the members were neither misled nor misinformed as to their duties in adjudging an appropriate sentence. Accordingly, appellant was provided a fair and full

evaluation of all the evidence pursuant to R.C.M. 1004, MCM, 1984, which guaranteed meaningful deliberations by the members prior to the imposition of the death sentence.

III.

PRESIDENTIAL PROMULGATION OF R.C.M. 1004

The procedures followed in this capital case in ultimately adjudging the death penalty were those set forth in R.C.M. 1004, MCM, 1984. R.C.M. 1004 was promulgated by the President as a part of MCM, 1984 and became effective 1 August 1984.[3] Appellant contends that the sentencing procedures are invalid because the President exceeded the power delegated to him by Congress under Article 36, UCMJ, 10 U.S.C. § 836, in that the rule is substantive in nature and not procedural.

Judge Albertson, in her dissent, agrees with this proposition, but goes even further in finding fault with the death penalty provisions of MCM, 1984. It is her position that Article 118, UCMJ, has been invalidated as unconstitutional as a result of the United States Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Alternatively, she argues that the President impermissibly encroached on the legislative powers of Congress in promulgating R.C.M. 1004 or, if the delegation could be construed as permissible, Congress failed to provide sufficient specific guidelines to prevent the President from acting arbitrarily.

We disagree with these arguments and find that Article 118, UCMJ, has not been rendered unconstitutional and that the Presidential promulgation of R.C.M. 1004 was legally valid.

A.

We turn first to an analysis of the post *Furman* status of Ar-

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[3] It was subsequently amended by Executive Order No. 012550 of 19 February 1986 (MCM 1984, change no. 2).

ticle 118, UCMJ. In *Furman* and its progeny, the Supreme Court struck down various state death penalty statutes as violating the Eighth Amendment because sentencing authorities were permitted to exercise uncontrolled discretion in determining whether to impose the death senence. As Judge Albertson points out, the dissenters in *Furman* speculated as to the effect the decision might have on other existing state and federal statutes, including the Uniform Code of Military Justice. This speculation, however, was simply dicta and in no way directly affected any other statute, including the capital sentencing provisions of Article 118, UCMJ. The decision that did affect these provision was handed down by the United States Court of Military Appeals in *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983). As a result, we must turn to *Matthews* to determine the status of Article 118, UCMJ.

In *Matthews*, the Court of Military Appeals held that the death sentencing procedures employed by courts-martial in capital cases were defective because of the failure to require the court members to make specific findings as to individualized aggravating circumstances which could be factually and legally reviewed on appeal. *Id.* at 380. This holding did not invalidate Article 118, UCMJ as being unconstitutional. Instead, it merely found that the *procedures* utilized in imposing the death sentence were constitutionally inadequate. The Court recognized Congress' intent that the death penalty be a sentencing option only for certain offenses, including premeditated murder, *id.* at 380, and the Court noted the effect their ruling would have:

> Our ruling in this case . . . creates a void which must be filled promptly in order to effectuate the congressional intent that court-martial members have the option of imposing a death sentence for certain crimes.

Id. at 381.

However, the Court further specifically recognized the continuing vitality of Article 118 by setting forth two alternative means to remedy the deficiencies of the sentencing procedure, neither of which required that Congress reaffirm its intent that the death penalty be authorized for premeditated murder. *Id.* at 380, 381. Congressional intent that the death penalty exist as a permissible sentence for premediated murder was in no way thwarted nor invalidated by *Matthews*. We find no holding of any court which has invalidated Article 118 as unconstitutional.

B.

The effect of *Matthews* was to prohibit the imposition of the death penalty until the procedural defect found by the Court was remedied. The Court noted that the action to remedy this defect could either be taken by Congress or the President. *Id.* at 380. Corrective action was taken by the President when R.C.M. 1004 was promulgated as a part of MCM 1984. The issue is whether this promulgation was legally valid.

Congress has delegated several of its powers with respect to the UCMJ to the President. Article 56, 10 U.S.C. § 856 delegates the power to set maximum punishments for certain courts-martial offenses and Article 36 delegates the power to prescribe rules. Article 36, UCMJ, provides, in pertinent part:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial . . . may be prescribed by the President by regulations which shall . . . apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

To determine whether the promulgation of R.C.M. 1004 properly falls within this provision we first look to the Court of Military Appeals discussion in *Matthews.* When indicating that corrective action could be taken by the President in his capacity as Commander-in-Chief under Article II, Section 2, of the Constitution, and pursuant to the power delegated to him by Congress, the Court stated:

> Pusuant to Article 36 of the Uniform Code, the President promulgates rules to govern pretrial, trial, and post-trial procedures of courts-martial. Unlike other Federal criminal statutes the punitive articles of the Uniform Code for the most part authorize punishment "as a court-martial may direct"; no maximum or minimum sentence is specified. However, as contemplated by Article 56 of the Uniform Code, 10 U.S.C. § 856, the President prescribes maximum punishments for the various offenses. . . .
>
> The great breadth of the delegation of power to the President by Congress with respect to court-martial procedures and sentences grants him the authority to remedy the present defect in the court-martial sentencing procedure for capital cases. . . .

Id. at 380, 381.

It is certainly clear from this language that the Court believed it was well within the President's power, as delegated to him by Congress, to promulgate these procedures.[4]

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[4] The Court of Militry Appeals belief that the President has the power to promulgate these procedures is also consistent with the Court's holding in *United States v. Flucas,* 49 C.M.R. 449 (C.M.A. 1975), where the Presidential promulgation of a Manual provision was found to be valid which added the element of knowledge in assault cases where this element was provided as an aggravating factor increasing the maximum permissible punishment.

The court's analysis that the sentencing defects were procedural in nature, and thus within the President's power to correct, is consistent with the Supreme Court's holding in *Dobbert v. Florida,* 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). In *Dobbert,* the death penalty statute in effect at the time the defendant committed murder was struck down as violative of the holding in *Furman.* Prior to the defendant's trial, however, a new death statute was enacted. The question was whether the changes in the new statute were procedural in nature, thus allowing it to be retroactively applied against the defendant, or substantive, thereby prohibiting retroactive application based on the constitutional prohibition against *ex post facto* laws. *See* U.S. CONST. art I, § 10.

The original statute provided that a person convicted of a capital offense would be punished by death unless the jury recommended mercy. The revised statute established, *inter alia,* a bifurcated sentencing proceeding, a specific enumeration of aggravating circumstances, an opportunity to present relevant evidence of mitigating and aggravating circumstances, a test to balance mitigating circumstances against aggravating circumstances and procedures to review any death sentence imposed. In concluding that these changes were procedural and that there was no *ex ost facto* violation, the Court stated:

> . . . [t]he change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime.

Dobbert, 432 U.S. at 293, 294, 97 S.Ct. at 2298, 53 L.Ed.2d at 356.

The Court further supported the conclusion that the change was procedural by quoting from *Hopt v. Utah,* 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), as follows:

> The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.

Dobbert, 432 U.S. at 294, 97 S.Ct. at 2298, 2299, 53 L.Ed.2d at 357.

R.C.M. 1004 established capital sentencing provisions which are similar to the statutory changes in *Dobbert*. R.C.M. 1004 sets forth aggravating factors, one or more of which must be found before death may be considered; provides a notice requirement concerning these factors; provides broad latitude to present evidence in extenuation and mitigation; establishes voting procedures; and provides for necessary findings, including a balancing test, as a prerequisite to adjudging a death sentence. As in *Dobbert*, R.C.M. 1004 simply altered the methods employed in determining whether the death penalty was to be imposed. Thus, we reach the same conclusion as the Court in *Dobbert* as to the nature of these provisions. We find that the changes in the capital sentencing scheme brought about by the provisions of R.C.M. 1004 are clearly procedural.

C.

The next question is whether such as promulgation is contrary to the intent of Congress. We analyze this from two perspectives. First, Article 36(b) requires that the President report to Congress when rules and regulations are made. In accordance with this provision, copies of the Executive Orders promulgating R.C.M. 1004 as a part of MCM, 1984, and the subsequent modification to R.C.M. 1004 were transmitted to Congress. 130 Cong.Rec. H-7611 (daily ed. July 23, 1984) (EC-3679); *id.* S-9217 (daily ed. July 25, 1984) (EC-3579); and 132 Cong.Rec. H-1022 (daily ed. March 11, 1986) (EC-2959); *id.* S-2355 (daily

ed. March 10, 1986) (EC-2667). Thereafter, no Congressional objection to R.C.M. 1004 was voiced and consequently, tacit approval of these procedures can be inferred. Second, and more important, is the Congressional intent reflected in the passage of Public Law 99-145, Title V, § 534(a), Nov. 8, 1985, 99 Stat. 634, which amended the Uniform Code of Military Justice by establishing espionage as a capital offense under Article 106a, UCMJ, 10 U.S.C. § 906a. This article creates certain aggravating factors which the members must unanimously find beyond a reasonable doubt in order to adjudge a sentence of death. In addition, it provides specific recognition of the President's power to delineate aggravating factors for a capital offense, as follows:

> (4) Any other factor that may be prescribed by the President by regulations under section 836 of this title (Article 36).

Article 106a(c)(4), UCMJ, 10 U.S.C. § 906a.

Furthermore, in considering the legislative intent associated with this act we note the following:

> The conferees did, however, adopt a statutory formulation of capital sentencing standards for espionage cases and intend that those standards be implemented in a manner consistent with the provisions of Rule for Courts-Martial 1004 of the Manual for Courts-Martial, 1984. The conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards that already exist for the other capital punitive articles.

Department of Defense Authorization Act of 1986, Pub.L. No. 99-145, 1985 U.S.Code Cong. & Admin.News pp. 472, 579.

This legislative intent evidences a clear ratification of the Presidential action in promulgating R.C.M. 1004. This, com-

bined with the statutory provision allowing the President to establish aggravating factors and the tacit approval of R.C.M. 1004, convinces us that Congress does not believe that the President has encroached on its legislative prerogative in this matter.

D.

The only remaining question is whether, in spite of the beliefs of the Court of Military Appeals, the President, and Congress, promulgation of this rule is nevertheless constitutionally flawed because the Congressional delegation of power to the President under Article 36, UCMJ, is violative of the principle of separation of powers.[5] The Supreme Court has long recognized that Congress generally cannot delegate its legislative powers to another branch of Government. *Field v. Clark*, 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36 L.Ed. 294, 310 (1892). Nevertheless, they have recognized that this prohibition does not prevent Congress from acquiring the assistance of other branches. *J.W. Hampton, Jr. & Company v. United States*, 276 U.S. 394, 406, 48 S.Ct. 348, 351, 72 L.Ed. 624, 629 (1928). In *Hampton*, the Court indicated:

> In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination. . . . Congress has found it . . . necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion . . . to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations.

[5] U.S. CONST. art. I, § 1 provides that legislative powers shall be vested in the Congress of the United States.

Id. (Citations omitted).

As a result, many Congressional delegations of power have been upheld. *See, e.g., Mistretta v. United States*, __ U.S. __, 109 S.Ct 647, 102 L.Ed.2d 714 (1989) (upholding delegation to the United States Sentencing Commission of the power to promulgate binding sentencing guidelines for federal offenses); *Lichter v. United States*, 334 U.S. 742, 785-78, 68 S.Ct. 1294, 1316-1317, 92 L.Ed. 1694, 1725-1726 (1948) (upholding delegation to Secretary of War and other administrative officials of the authority to determine excessive profits); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600, 64 S.Ct. 281, 287, 88 L.Ed. 333, 344 (1944) (upholding delegation of authority to Federal Power Commission to determine just and reasonable rates).

The Supreme Court has upheld Congressional delegation of authority where it "is sufficiently specific and detailed to meet constitutional requirements", *Mistretta*, __ U.S. at __, 109 S.Ct. at 655, and where "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power & Light Co. v. SEC*, 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103, 116 (1946). In her dissent, Judge Albertson argues that Article 36, UCMJ, fails to meet these requirements, particularly as to establishing specific standards to prevent the President from acting arbitrarily. We do not agree.

Article 36, UCMJ, delineates the general policy to prescribe pretrial, trial, and post-trial procedures for cases tried by courts-martial. It states that the authority is delegated to the President, and, most importantly, it *does* establish specific boundaries to limit the President's action under this provision. The President, in prescribing these procedures, is bound to apply the principles of law recognized in criminal trials in the United States district courts. Consequently, he does not have unfettered discretion to do as he pleases. Rather, he may not act arbitrarily and he must follow the law. He is subject to an additional check in that he

must report all rules and regulations made under this article to the Congress.

The President's action in promulgating R.C.M. 1004 falls squarely within the specific and detailed boundaries of his authority. R.C.M. 1004 complies not only with the legal principles of the United States district courts, but also with those of the United States Supreme Court. *See Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); *Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). We find no defect, constitutional or otherwise, in the promulgation of this rule.

IV

Equal Protection

Appellant alleges that he has been denied his right to the equal protection of the law and to be free from cruel and unusual punishment because as a member of the armed forces he has been sentenced to death when this punishment is not available for murder tried in federal civilian courts. The appellant's assertion that his rights under the Fifth and Eighth Amendments have been violated by Congress' decision to make the death penalty available for violations of Article 118, UCMJ, and the President's promulgation of the procedures in R.C.M. 1004, MCM, 1984, for the imposition of the death penalty, is without merit.[6]

[6] The Eighth Amendment is violated when the death penalty is carried out in barbaric or inhumane method or if it is excessive in relation to the crime committed. *See Coker v. Georgia,* 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); *Gray v. Lucas,* 677 F.2d 1086 (5th Cir.1982). Since the appellant has not factually developed the method in which naval personnel are to be executed and since the question of whether the death penalty is proportionate to appellant's crime is fully discussed in section VIII, we will analyze this allegation of error pursuant to the due process clause of the Fifth Amendment.

The Court of Military Appeals has held that not every distinction or varied treatment of military personnel made by the Government violates equal protection guarantees of the Constitution. *United States v. Means,* 10 M.J. 162, 165 (C.M.A. 1981). It is only when the distinction or treatment becomes unjustifiable discrimination that a service member's due process rights to the equal protection of the laws are implicated. *United States v. Rodriguez-Amy,* 19 M.J. 177, 178 (C.M.A.1958); *United States v. Larner,* 1 M.J. 371, 375 (C.M.A.1976). In order to determine when a distinction or treatment is justifiable it is necessary to first examine whether the Government has utilized constitutionally suspect classifications such as race, religion, or national origin, or whether the Government is encroaching on fundamental constitutional rights. If neither suspect classifications nor fundamental constitutional rights are involved, then the Govenment's varied treatment of service members need only have a reasonable or rational basis. *Means,* 10 M.J. at 165.

Appellant has alleged that his fundamental right to life is encroached by the Government's decision to make the death penalty a permissible sentence for service members and, therefore, a higher standard of scrutiny should be utilized than the rational basis test for determining whether he has been denied equal protection of the law. This particular issue is of first impression in military law and we will look to federal case law for precedent. The Fifth Circuit Court of Appeals has twice examined this exact issue. In *Gray v. Lucas,* 677 F.2d 1086 (5th Cir.1982), *cert. denied,* 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1983) the Court held that the presence of a death penalty in a criminal statute does not encroach on a fundamental right so as to trigger a heightened level of scrutiny. The Fifth Circuit based its decision on the Supreme Court's reasoning in *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

In *Gregg,* the Supreme Court reasoned that because of the complex issues involved in determining the moral values of so-

ciety and the social utility of the death penalty, it is particularly within the province of the legislature to establish the degree of punishment for certain classes of crimes. Therefore, the Court reasoned that the decision to authorize the death penalty for certain classes of crimes should not be upset by the courts unless it is "clearly wrong." *See Gregg*, 428 U.S. at 186-188, 96 S.Ct. at 2931, 49 L.Ed.2d at 882. Accordingly, it was held in *Gray v. Lucas* that equal protection challenges to a death penalty scheme should be analyzed under a rational basis test, and not the heightened level of scrutiny which appellant urges. This holding was later reaffirmed in *Williams v. Lynaugh*, 814 F.2d 205 (5th Cir.1987), *cert. denied*, 484 U.S. 935, 108 S.Ct. 311, 98 L.Ed.2d 270 (1987).

The legal reasoning in *Gray v. Lucas* and *Williams v. Lynaugh* is sound and we will, therefore, analyze appellant's equal protection challenge to R.C.M. 1004, MCM, 1984, according to the rational or reasonable basis test. *But cf. Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (the punishment of sterilization was held to encroach upon the fundamental right of procreation).

Congress had a rational basis for deciding to authorize the death penalty for a violation of Article 118 and to delegate to the President the task of promulgating the procedures to impose this punishment on service members. Service members, because of their mission to wage war, may need the more stringent deterrent of capital punishment to ensure discipline. It is the necessity to secure from service members "prompt obedience to lawful orders and the maintenance of the orderliness and self-discipline necessary to the effective operation and control of an armed force in combat" that precipitated the establishment of the UCMJ as a disciplinary system. *United States v. Van Steenwyk*, 21 M.J. 795, 801 (NMCMR 1985). It is because "the military is by necessity, a specialized society separate from civilian society" that civilian definitions of "criminal law" cannot be applied to establish

the parameters necessary to maintain military discipline. *Parker v. Levy*, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439, 450 (1974). Therefore, it is reasonable for Congress to ensure military discipline by providing a heightened punishment for a breach of military criminal law than would be authorized for similar breaches of federal civilian criminal law.

It is also reasonable for Congress to address the potential fears that the civilian community may have towards maintaining a professional and permanent fighting force by authorizing death for certain heinous crimes, such as murder. Clearly, a rational basis exists for the federal Government to distinguish civilians convicted of murder from federally trained and government spionsored military members convicted of murder and to legislate a different form of punishment for these two classes of criminals. Thus, we find the appellant's equal protection challenge to the punishment of death for a violation of Article 118 and to the procedures as set forth in R.C.M. 1004 to be without merit.

V

Challenge For Cause

After lengthy *voir dire*, one of the prospective members, Captain Emerson, was challenged for cause by the Govenment. The Government based its challenge on the case of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), arguing that because of his religious up-bringing and beliefs, Captain Emerson could never, under any circumstance, vote to impose the death penalty. The military judge granted the Government's challenge for cause, stating:

> I believe that he would not have any difficulty in voting for a finding of guilty which would automatically result in a penalty of death. But in this case I think it it clear to the military judge that he does have an inelastic attitude as described for—to voting in *U.S. v. Rojas*, [15 M.J. 902 (NMMR 1983)] and although he used

> the words that he would consider, I don't think that that consideration would be a meaningful one anyway, and that, notwithstanding his sincerity, he would be compelled to vote for the alternate punishment.

Appellant asserts that the military judge erred in granting this challenge for cause. He contends that the military judge's reliance on *Witherspoon* and *United States v. Rojas*, 15 M.J. 902 (NMCMR 1983), was misplaced and that a new standard exists which would not have excluded Captain Emerson. Appellant is correct to the extent that the standard applicable to this challenge is the one set forth in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). However, we find that the military judge considered *Adams* in making his ruling and that Captain Emerson's views concerning capital punishment permitted his challenge under this standard. Thus, appellant's contention is without merit.

In *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court reaffirmed that *Adams v. Texas* established the proper standard for determining when prospective jurors may be excluded for cause because of their views on capital punishment.[7] *Adams* permits a juror to be challenged for cause when his views about capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. *Wainwright*, 469 U.S. at 423, 105 S.Ct. at 851, 83 L.Ed.2d at 851. This standard abolishes the *Witherspoon* reference to "automatically" voting against the death penalty, thereby dispensing with the requirement that a juror could only be excluded if he would never vote for death. In addition, it eliminates the ex-

[7] In reaffirming this standard, the Court noted that the genesis for excusing jurors in capital cases was to prevent the state's legitimate interest in administering constitutional capital sentencing schemes from being frustrated. *Wainwright*, 469 U.S. at 423, 105 S.Ct. at 851, 83 L.Ed.2d at 851.

tremely high burden of proving that a juror's bias is "unambiguous" or "unmistakably clear". *Id.* 469 U.S. at 423, 424, 105 S.Ct. at 851, 852, 83 L.Ed.2d at 851, 852.

In applying this standard in *Wainwright*, the Supreme Court upheld the trial judge's excusal for cause of a juror who stated that her beliefs concerning the death penalty would interfere with her sitting as a juror. In so finding, the court gave great deference to the trial judge's findings as long as the findings were fairly supported by the record regardless of whether a reviewing court might disagree with these findings. The Court noted:

> . . . determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

469 U.S. at 434, 105 S.Ct. at 857, 83 L.Ed.2d at 858, citing *Marshall v. Lonberger*, 459 U.S. 422, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

The Supreme Court similarly applied the *Adams* standard in *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), and upheld the removal of eight jurors for cause prior to the guilt phase of a bifurcated trial. In that case, the trial

judge removed for cause eight of the jurors who stated that they could not under any circumstance vote for the imposition of the death penalty.

In this case, Captain Emerson was thoroughly questioned by both counsel and the military judge. He indicated that he had definite reservations concerning the death penalty. These reservations were founded on his religious teachings and belief that only God could take a life. Captain Emerson appeared to be quite ambivalent during the initial portion of the *voir dire* as to how his beliefs might affect his ability to sit as a member and adjudge a sentence.[8] Subsequently, however, his feelings became much more focused, particularly after he realized that he had another option available during sentencing other than death:

> DC: Well, I'm a little confused because it seems to me that you're saying two things at the same time. Are you saying that it's your religious belief that it's an extremely difficult thing to do, to vote for a death penalty?
>
> MEM(CAPT EMERSON): Yes, sir.
>
> DC: And at the same time you're saying that, yes, because of my obligation as a military officer, I could consider it and I could do it?
>
> MEM(CAPT EMERSON): I could consider it, but once again I stated that if there is another option that I would probably sway towards the other option.

R. 167, 168.

[8] It is clear from the record that Captain Emerson's religious beliefs would not have interfered with his ability to determine guilt or innocence during the findings phase of the trial.

> TC: So you, under no circumstances, because of your religious beliefs could vote for a penalty of death regardless of the facts and circumstances of the case?
>
> MEM(CAPT EMERSON): Yes, sir.
>
> TC: You could consider it, but you could not vote for it?
>
> MEM(CAPT EMERSON): Yes, sir.
>
> TC: Because of your religious beliefs?
>
> MEM(CPT EMERSON): Yes, sir.
>
> TC: And that's the truth from the bottom of your heart, is it not?
>
> MEM(CAPT EMERSON): Yes, sir.
>
> TC: Captain Emerson?
>
> MEM(CAPT EMERSON): When he asked me do I consider it, I said "I'd consider it." But once again, I will always go with the other option.

R. 169.

> MJ: Now, considering the prefatory remarks of Major Boyett, we got to the point in which you were called upon to cast your vote either for the death penalty or for the other alternative punishment. Do I correctly understand that you would in all events cast your vote for the alternative punishment?
>
> MEM(CAPT EMERSON): Yes, sir.

R. 173.

The foregoing testimony clearly illustrates that Captain Emerson's beliefs would affect his ability to adjudicate a sentence in that he would always choose an alternative other than death even though he would "consider" death. We agree with the military judge that this "consideration" would not be a meaningful one.

We must now examine Captain Emerson's responses in light of the *Adams* test to determine whether his exclusion for cause was proper. We initially note that, contrary to appellant's assertion, the military judge did not rely solely on *Witherspoon* and *Rojas* in ruling on this challenge. In fact, following a recess toward the end of *voir dire*, he compared Captain Emerson's responses specifically with the *Adams* and *Lockhart* cases.

We give deference to the military judge's determination of Captain Emerson's views based on his personal observation of Captain Emerson and conclude that it is fairly supported by the record. We find that if Captain Emerson had been allowed to serve as a member in this case he would have effectively frustrated the Government's legitimate interest in administering its constitutionally valid death penalty scheme by always voting for an option other than death regardless of the circumstances. We find that Captain Emerson's views would have prevented or substantially impaired the performance of his duties as a juror in accordance with his instructions and his oath. The excusal of Captain Emerson for cause was proper.

VI

Denial of Right to a Panel of Fair and Impartial Members

Appellant made a motion for appropriate relief at trial asserting that his Sixth Amendment right to an impartial jury had been violated in that the members selected by the convening authority did not represent a cross section of the community. This same issue is raised on appeal and, in addition, appellant contends that even if the Sixth Amendment is inapplicable to courts-martial, he nevertheless was denied his due process right to be tried by members with fair and open minds whose impartiality could not be reasonably questioned. We find no merit to either contention.

In support of his motion, appellant called a clinical psychologist to testify. The witness was qualified as an expert in behavioral psychology. As to foundational matters, the psychologist testified that he was aware of the fact that appellant was alleged to have murdered a Marine officer and his wife, that he had reviewed the convening orders and modifications, and was aware of the composition of the prospective membership of the court. The psychologist testified that he was concerned that the officer members would not be totally impartial and objective because of their higher likelihood of identifying with the victim, who was also an officer. He proposed that the situation could be remedied by selecting the prospective members at random. No inquiry was made of the psychologist as to the ability of an officer chosen at random to be impartial and objective. Subsequently, the members were extensively questioned in *voir dire* and, as appellate defense counsel concedes in his brief, the officer members who ultimately decided the case gave no specific responses during *voir dire* which indicated any inability to be impartial. It is also significant to note that the assistant defense counsel acknowledged to the military judge that there was no indication that the convening authority had failed to comply with Article 25, UCMJ, 10 U.S.C. § 825.[9]

Congress has specifically prescribed in Article 25, UCMJ, the qualifications for service as a member of a courts-martial. It provides in pertinent part:

> [T]he convening authority shall detail as members thereof such members as, in his opinion, are best qualified for the duty by reason of age, education, training,

[9] This is uncontested on appeal.

experience, length of service, and judicial temperament.

The Court of Military Appeals has noted on several occasions that the Sixth Amendment right to a jury composed of a representative cross section of the population does not apply to courts-martial and, in fact, Article 25 contemplates otherwise. *See United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A.1988); *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986).

We consider unpersuasive the appellant's argument that the testimony of his expert, standing alone, was sufficient to dismiss the members.

The record contains nothing at all to support appellant's conclusion. The expert testified in advance of *voir dire* and expressed a "concern" that the officer members might identify with the victim and therefore be partial. This "concern" was wholly unsubstantiated by specific responses of prospective officer members during *voir dire*. While the expert had testified in numerous trials, he admitted that this was the first time he had expressed an opinion on this particular issue. Finally, his remedy to resolve the situation—to randomly select members from the command—leaves open the distinct possibility that the officers chosen in this manner might have the same inclination to identify with the victim. His remedy in no way seeks to exclude officers entirely from the panel[10] which would logically resolve his concern, but merely offers an alternative method for selecting prospective members than is set forth in Article 25. The proposed remedy is inconsistent with the psychologist's own opinion and detracts from its validity. We find nothing to support the allegation that

[10] While an accused is not entitled to a panel composed of entirely enlisted personnel, Article 25 does not preclude such a result. It merely requires that *at least* one-third of the members be enlisted when the accused has made a request for enlisted members.

the officer members might not be impartial. To the contrary, the record is replete with assurances by the members that they would follow the law and give appellant a fair trial. The military judge correctly denied this motion for appropriate relief.

VII

Peremptory Challenge

At the conclusion of *voir dire*, Government counsel peremptorily challenged Staff Sergeant Edwards, a black, who is of the same racial group as appellant. Defense counsel objected on the basis that the peremptory challenge was used in a discriminatory manner, but the objection was ultimately overruled by the military judge. Appellant contends that the military judge erred in this ruling, thereby denying his right to equal protection of the law.

The Supreme Court has held that a defendant has the right to be tried by a jury from which no "cognizable racial group has been excluded" and, thus, "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79 at 89, 106 S.Ct. 1712 at 1719, 90 L.Ed.2d 69 at 83 (1986). This right to equal protection is part of due process under the Fifth Amendment and applies to trials by Courts-Martial. *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988). *See also United States v. Shelby*, 26 M.J. 921 (NMCMR 1988).

Batson provides that once the defendant makes a prima facie showing of purposeful discrimination in the Government's use of the peremptory challenge, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88. A prima facie case is established when the defendant shows that he is a member of a cognizable racial group; that the pros-

ecutor exercised peremptory challenges to remove members of defendant's racial group; and, that these facts and any other relevant circumstances raise an inference that the use of these challenges was to purposely exclude jurors because of race. This inference is based on the totality of the circumstances and such things as a "pattern" of strikes of members of a racial group or the prosecutor's questions and statements during *voir dire*, may be considered. *Batson*, 476 U.S. at 96, 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88.

It is insufficient to rebut the prima facie case by a mere assertion of the prosecutor that he was properly performing his duties and had no discriminatory motive for his challenge. It is not, however, necessary for the neutral explanation to rise to the level that would justify a challenge for cause. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1722, 1723, 90 L.Ed.2d at 88. In *Batson*, the case was remanded because the prosecutor used his peremptory challenges to remove all four black persons on the venire which resulted in the defendant, also black, being tried by an all white jury.

In *Santiago-Davila*, the accused was of Hispanic descent and the court members selected by the convening authority consisted of ten officer and enlisted members, two of whom had Hispanic surnames. Following *voir dire*, the Government peremptorily challenged one of the Hispanics and the military judge allowed the challenge to stand in spite of an objection by defense counsel. The military judge offered trial counsel an opportunity to state a reason for the challenge but trial counsel declined to do so and the military judge did not require that a reason be given. In remanding *Santiago-Davila*, the Court of Military Appeals found that a prima facie case of purposeful discrimination had been established which required that a neutral explanation be given. The Court was not persuaded by the fact that one Hispanic remained on the panel, and it was of particular importance that they found an absence of anything in the *voir dire* or anywhere else in the record to clearly indicate anything other than race as a motive for the challenge. *Santiago-Davila*, 26 M.J. at 391.

Turning to the case *sub judice*, the court selected by the convening authority consisted of nine officers and six enlisted members. Of these, six were black. One black officer was successfully challenged for cause by the defense because he knew Lieutenant Lotz and was Lotz's superior in the chain of command. Another black officer, Captain Emerson, was also challenged for cause by the Government for the reason discussed in a prior assignment of error. The Government further successfully challenged for cause a white officer without objection and the defense similarly challenged for cause two more white officers. Thus, at the time the Government exercised its peremptory challenge against Staff Sergeant Edwards, the panel consisted of four officers and six enlisted persons, four of whom were black. The final racial composition of the court was six whites and three blacks (one officer and two enlisted).

During *voir dire*, trial counsel initially experienced some difficulty in ascertaining that Staff Sergeant Edwards understood the concept of the government's burden to establish guilt beyond a reasonable doubt and required assistance by the military judge in defining terms. Thereafter, the *voir dire* appeared to proceed smoothly without revealing anything of particular significance until the following relevant exchange occurred:

> TC: I'll just ask one general question, Staff Sergeant. How do you feel about, again, being—sitting here as a member in this case? Your own words.
>
> MEM(SSGT EDWARDS): I feel, sir, basically that it would be to me a learning experience. And coming in with an open mind, being able to give everything, weighing out everything, and listening to all the facts before I finally say whether a person is innocent or

guilty, it would be a good experience for me and something that I would like to go through, sir.

TC: You'd also agree that not—it's not only would be a learning experience, it would be a very, very serious responsibility?

MEM(SSGT EDWARDS): Yes, sir.

TC: Possibly one of the more serious responsibilities in your whole life?

MEM(SSGT EDWARDS): Yes, sir.

This concluded the *voir dire* of Staff Sergeant Edwards and he was subsequently peremptorily challenged by the Government. Defense counsel made a timely objection and requested that the government state the reason for the challenge. At the time, because *Santiago-Davila* had not yet been decided, the military judge and counsel recessed and considered the ruling in *Batson*. Thereafter, the military judge and trial counsel believed it would be best for trial counsel to state the reason for his challenge. There was no discussion or finding as to whether a prima facie case of purposeful discrimination had been established. The defense counsel expressed his concern as follows:

DC: Now, it strikes the defense that the government has known for some three and a half months that this case involved a defense theory which potentially would involve racial prejudice. As I remember the answers of Staff Sergeant Edwards, he met all legal criteria to be a member. No one had any objection to him for cause or anything like that. And it strikes the defense as rather strange at this particular point in time that the government is using its one peremptory challenge to take a black man off this jury. Of course, there's nothing that I can point to which proves that it's racially motivated in any particular form, fashion, or manner because I can't look in the minds of the prosecution. But it essentially gives a bad flavor to the whole thing and it's the position of the defense that we should not only be worried about actual fact, but impression and how it looks as well because the court is, after all, essentially, an instrument which is supposed to arrive at fairness.

The military judge discussed the challenges of the other blacks from the panel.

MJ: Well, of course, there were—I think at least two black members that were excused by challenges for cause, but neither one of those had any racial foundation; is that correct?

DC: Yes, sir.

After further discussion concerning specific rationale for these challenges, trial counsel stated his reason for challenging Staff Sergeant Edwards.

TC: My articulation, sir, is, first of all, in my opinion Staff Sergeant Edwards' responses to the voir dire, while satisfactory, didn't indicate to me to be the kind of member that the government would want on this case and one thing particularly that he said, if I remember correctly, he said that he would consider this as a learning experience which, in the Government's opinion, that was not the—while not challengeable for cause, that is why the government chose to exercise its peremptory challenge on him.

Appellant contends that this is not the neutral basis for challenge required by *Batson*. The Government asserts that trial

counsel's explanation indicated that the purpose for the challenge was race-neutral assuming *arguendo* that a prima facie case of discrimination had been shown.

In deciding this issue we will initially analyze whether there was a prima facie showing of purposeful discrimination in connection with the peremptory challenge of Staff Sergeant Edwards. First, appellant is a member of a cognizable racial group and, second, the Government's peremptory challenge sought to remove a member of that group. The only remaining question is whether the totality of the circumstances raise an inference that the challenge was used to exclude this member solely because of race.

Examining the pattern of challenges exercised by trial counsel, we note that challenges for cause were exercised against one white and one black officer. The black officer was challenged because of his beliefs regarding capital punishment. In fact, defense counsel agreed with the military judge that this challenge had no racial foundation. Appellate defense counsel further concedes that he can point to nothing which proves the challenge was racially motivated. Our review of the record likewise reveals nothing said by trial counsel during *voir dire* that would infer the challenge was racially motivated. Our determination of this question is hampered by the fact that the military judge made no findings with respect to this prima facie showing either because he simply neglected this step in applying the *Batson* principles or because he believed there was an automatic inference of purposeful exclusion merely because of the defense theory involving racial prejudice or for some other reason. Without speculating further, we will exercise caution and follow the Court of Military Appeals in their belief that the trial judge is able to decide if all of the circumstances surrounding the challenge create a prima facie case. *Santiago-Davila,* 26 M.J. at 392.

Finally, we must analyze whether trial counsel's explanation was neutral. Trial counsel stated that Staff Sergeant Edwards

was not the kind of member the Government wanted on the case because he stated he would use it as a learning experience.[11] In response to this explanation the military judge indicated that this was the only thing he had written down with respect to Staff Sergeant Edward. He noted that it was probably an unfortunate choice of words but it nevertheless caught his attention. The military judge, in denying the defense's objection and thus sustaining the peremptory challenge, found that, while he might not agree with the Government's stated reason, it was understandable and had sufficient foundation to satisfy *Batson.* We agree with the militlary judge.

Trial counsel's questioning during the entire *voir dire* reflected the fact that he wanted the court to consist of members who were aware of the serious responsibility of deciding a capital case and who were capable of carrying out that responsibility. We believe that trial counsel sensed something less than these qualities in Staff Sergeant Edwards and felt that a case with the serious consequences of this one should not be used an a "learning experience". We find this explanation to be totally devoid of any racial motivation and to be completely neutral.

VIII

Appropriateness of the Sentence to Death

Finally, we consider the appropriateness of appellant's sentence to death. Appellant contends that he should not be put to death because his murder of the Lotzs was simply a reaction to the way he had been treated by Lieutenant Lotz. He also con-

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[11] There may have been other factors of concern to trial counsel such as the difficulty he encountered in explaining to Staff Sergeant Edwards the concept of the Government's burden to prove guilt beyond a reasonable doubt. We will not speculate, however, as to what "other" factors may have influenced trial counsel to exercise this challenge and we have confined our analysis solely to the reason stated in the record.

tends that no proper penal interest would be served by such a sentence. He argues that these factors militate against imposition of the death penalty in this case. Chief Judge Byrne in his dissent, cites the "racial stereotyping of appellant by Lieutenant Lotz",[12] as well as the lack of recent precedent for executions in the Naval Service, as reasons for opposing the death penalty in this case. We do not agree with this reasoning.

We begin our analysis of this issue by carefully considering Lieutenant Lotz's relationship with his subordinates and the atmosphere that existed in the supply office. Lieutenant Lotz referred to his subordinates by nicknames, either nicknames he coined himself or those invented by others. A Marine of Peruvian descent was called "a fuzzy headed foreigner'; others had names such an "tomahawk", "red', and "Jonesy". Lotz's use of nicknames was not confined to persons in his office and he called a black Marine officer friend, "Action Jackson". Several nicknames were used with respect to appellant— "Bebop Curtis" and "Curtis Blow" (apparently in reference to a black "rap" singer). In addition to the use of nicknames, Lotz allowed music to be played in the work spaces, and this was often "rap" music. While listening to this music, Lotz, on occasion, imitated what he thought were black mannerisms. The atmosphere was described by some as joking and casual.

Following a supply inspection, Litz as criticized by the inspector for calling his subordinates nicknames and was told that this practice was unprofessional. Thereafter, Lotz called the office personnel together and inquired as to whether the use of nicknames was offensive to anyone. No one persent, including

[12] In support of this reason, Chief Judge Byrne states that racial prejudice in sentencing was an underlying rationale for striking down the death penalty in *Furman*. Such rationale is inapposite to this case since in *Furman* the racial prejudice under consideration was that of the jury against the defendant rather than any prejudice by the victim against the accused as alleged in this case.

Curtis, voiced an objection to this practice and the use of nicknames continued.

Appellant testified that he was nevertheless bothered by these nicknames and by Lotz snapping his fingers at him, calling his mother by her first name and criticizing him for a bad attitude. Appellant acknowledged on cross-examination that his proficiency and conduct marks had improved under Lotz and that Lotz was training him for a job of increased responsibility within the office. Co-workers characterized the occasional criticism of Curtis as justified because Curtis was a slow worker and was sometimes lazy. Appellant asserts that Lotz's actions, as a whole, were offensive to him and that he perceived Lotz to be racially prejudiced.[13]

It is apparent that Lieutenant Lotz was insensitive to the feelings of minorities and to the potential effect of his conduct in this regard. Additionally, it is apparent that Lieutenant Lotz made the mistake which some junior, relatively inexperienced officers make of creating an overly familiar, informal atmosphere with his subordinates in an attempt to be accepted. This is not a proper

[13] We are unable to determine whether or not Lieutenant Lotz was, in fact, racially prejudiced. We note, however, that substantial evidence was admitted that Lotz was neither racially prejudiced nor acted in a discriminatory manner. For example, two black sergeants and a black staff sergeant who worked in the supply office testified that they did not believe that Lotz was racially prejudiced. They did not perceive "racial tension" in the office nor did they believe that the use of nicknames and imitations by Lotz were done in a racially derogatory fashion. The Company First Sergeant, also a black Marine, testified that during his twenty-five years of active duty he had seen racial prejudice; however, after knowing Lieutenant Lotz for two years, it was his opinion that Lotz was not prejudiced against black Marines. First Lieutenant Jackson, a black officer, knew Lotz well for almost eight months and testified that there was no question in his mind that Lotz was not prejudiced. Finally, a young black civilian testified that he lived with Lieutenant and Mrs. Lotz for about three months while he assisted Mrs. Lotz in coaching a basketball team at the school where she taught. He was treated as a member of the family in almost a "parental relationship".

or professional relationship between officers and enlisted personnel. The question, however, is whether Curtis should now be exempt from the death penalty beecause of the flawed leadership style of Lieutenant Lotz?

This question can be phrased in another manner: whether one who is dissatisfied with what he perceives to be the improper actions of his superior should escape the most severe punishment for murdering that superior? We believe tht it is contrary to the interests of society to mandate a lesser punishment for such a crime and still expect that such crimes will be deterred in the future. This is particularly true in a military environment where the very cornerstone of our system of discipline is the superior-subordinate relationship. To allow, or even suggest, that one should be less severely punished because of a "perception of maltreatment" by a superior would tear at the very fiber of our military system of discipline. We reject the notion that the death penalty is inappropriate under the circumstances of this case based on Curtis' perception of his relationship with Lieutenant Lotz.

Even if we were to believe that appellant's perception of mistreatment by Lotz somehow militated against the death penalty for killing Lieutenant Lotz, it is inexplicable why this in any way lessens his culpability for the brutal slaying of Mrs. Lotz. Curtis savagely stabbed Joan Lotz seven times as she begged for him to stop and then indecently assaulted her as she lay dying. Curtis admitted that Joan Lotz never did anything to hurt him.

We next address the argument that the death sentence is inappropriate simply because it has not been imposed in the Naval Service in recent history. This fact alone is not dispositive of the issue. As previously discussed in Section III, Congressional intent that death be a sentencing option for premeditated murder remains viable today. In addition, while no death sentences have been carried out in the recent past, the military community has recently expressed its intent that death is the appropriate sentence for premeditated murder under certain circumstances by

adjudging death at the courts-martial level. *See United States v. Turner,* No. 85-4044 (NMCMR 8 August 1986), *rev'd,* 25 M.J. 324 (C.M.A.1987), *aff'd,* No. 85-4044R (NMCMR 31 October 1988) (convening authority commuted death sentence to life imprisonment); *United States v. Rojas,* 15 M.J. 902 (NMCMR 1983) *rev'd in part,* 17 M.J. 154 (NMCMR 1981) (death sentence reversed for constitutional procedural infirmity, not for inappropriateness); *United States v. Hutchinson,* 15 M.J. 1056 (NMCMR 1983), *rev'd in part,* 18 M.J. 281 (C.M.A.1984) (summary disposition) (death sentence reversed for constitutional procedural infirmity, not for inappropriateness). We find these expressions of intent to be persuasive and discount any bar to approving the death sentence based on when the last time such a sentence was carried out.

Lastly, we address the contention that death serves no penal interest. The death penalty serves two social purposes: deterrence and retribution. *Gregg v. Georgia,* 428 U.S. 153, 183, 96 S.Ct. 2909, 2929-2930, 49 L.Ed.2d 859, 880. Appellant argues that deterrence can be accomplished with a life sentence and that retribution is irrational and has no place in the military justice system. We reject this argument.

As we previously noted, deterring serious criminal misconduct is of particular importance in the military because our ability to fulfill our mission is directly related to the discipline of our forces. In order for deterrence to be effective, we believe the full range of punishments for a particular offense ought to be available and that the punishment should be tailored to the individual and the circumstances of the offense.

Contrary to appellant's assertion, retribution has a place in our system of justice. In *Gregg,* Justice Stewart, in discussing retribution noted:

> [C]apital punishment is an expression of society's moral outrage at particularly offensive conduct. This

> function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

Id. 428 U.S. at 183, 96 S.Ct. at 2930, 49 L.Ed.2d at 880.

Justice Stewart further noted in *Gregg* a speech on capital punishment given by Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, in which it was stated:

> The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.

Royal Commission on Capital Punishment, minutes of Evidence, Dec. 1, 1949, p. 207 (1950).

In this case, we view the crimes committed by Curtis to be heinous and outrageous. The slaying of Lieutenant Lotz, Curtis' officer-in-charge, and Mrs. Lotz in their quarters aboard a military base and the manner in which these killings were accomplished convinces us that the death sentence is clearly proper. We do not arrive at this lightly and have carefully considered all of the circumstances surrounding the offenses and all evidence of extenuation and mitigation. Taking all of these factors into consideration, we find the sentence to death to be appropriate in this case.

IX

Decision

We have carefully examined the record of trial, the clemency request, the assignments of error and the Government's reply therto and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the

substantial rights of the appellant was committed. We are convinced of appellant's guilt of all of the charges and specifications beyond a reasonable doubt and specifically find the sentence to be appropriate. Article 66(c), Uniform Code of Military Justice.

Accordingly, the findings and sentence, as approved on review below, are affirmed.

Senior Judges COUGHLIN and RILEY, and Judges McLERAN, MIELCZARSKI, JONES and RUBENS concur.

BYRNE, Chief Judge (concurring/dissenting):

I believe life imprisonment, not death, is the appropriate penalty in this case.

The racial stereotyping, by one of the two murder victims, precipitated appellant's violent acts. *See, e.g.*, R. 591, 602-605.

This fact is vital because a matrix of contexts circumscribes when the death penalty is appropriate in the Naval Service. A Marine has not been executed since 1817.[1] There are strong religious and moral factors weighing against imposition of this ultimate sanction. Concern with racial prejudice in sentencing underlies the Supreme Court's rationale in *Furman v. Georgia.*[2] The Supreme Court has fenced in the death penalty with unique constraints limiting its imposition— in contrast to other lawful, imposable punishments.[3] Consequently, before any system of

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[1] Solis, LCOL Gary D., *Marines and Military Law In Vietnam: Trial by Fire* (Working Draft) History and Museums Divisions, Headquarters, U.S. Marine Corps.

[2] *See, e.g., Furman v. Georgia,* 408 U.S. 238, 251-53, 363-367, 92 S.Ct. 2726, 2732-33, 2763, 2789-91, 33 L.Ed.2d 346, 355-57, 390, 420-22.

[3] In *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), Justice Stewart stated:

> While Furman did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual

criminal justice in this land executes the death penalty, its rationale for doing so must be capable of withstanding withering

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punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. Mr. Justice White concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 US, at 313, 33 LEd2d 346, 92 S Ct 2726 (concurring). Indeed the death sentences examined by the Court in Furman were "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For of all people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in Furman were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." Id. [408 U.S.] at 309-310, 33 LEd2d 346, 92 SCt 2726. (Stewart, J., concurring).

428 U.S. at 188, 96 S.Ct. at 2932, 49 L.Ed.2d at 883.

Later, Justice Stewart concluded:

> In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or caprcious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

428 U.S. at 195, 96 S.Ct. at 2935, 49 L.Ed.2d at 887.

scrutiny.[4] The crimes committed by the accused must "cry out" for death. The racial overtones in this case have silenced that cry, in my opinion.

I would affirm only so much of the sentence as provides for confinement for life, total forfeitures, a dishonorable discharge, and reduction to pay grade E-1.

In all other respects, I concur with Judge Strickland's opinion.

ALBERTSON, Judge (concurring in part/dissenting in part):

I concur with the majority on their resolution of all issues except those discussed in section's three and eight of the majority opinion. I dissent from their resolution of the assignment of error relating to the Presidential authority to promulgate Rule for Court-Martial (R.C.M.) 1004, Manual for Courts-Martial (MCM), 1984, because I have concluded that, until Congress acts in an affirmative manner, the Article 118, Uniform Code of Military Justice (UCMJ), provision authorizing the imposition of the death penalty is constitutionally invalid as a result of the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Even if I am incorrect in that conclusion, I further conclude that the delegation of authority by the Congress to the President to promulgate R.C.M. 1004(c) was absolutely impermissible and as presently set forth in Article 36, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 836, does not include sufficient standards to guide the Presi-

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[4] Professor of Law George E. Dix commented in a Georgetown Law Journal article regarding appellate review of death sentences:

> Such a review implicitly includes an evaluation of whether reasonable persons would regard the death sentence as disproportionate to the offender's culpability, given the nature of the crime committed, the circumstances of its commission, and possible influences upon the defendant.

PIX, George E., "Appellate Review of the Decision To Impose Death," 68 Geo.L.J. 93, 107.

dent, in accordance with the principles set forth in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935), to promulgate R.C.M. 1004(c).

R.C.M. 1004 enunciates the only procedures and aggravating factors within the military justice system (except for Article 106a, UCMJ) for determining the appropriateness of the imposition of the death penalty. R.C.M. 1004 was promulgated in light of the suggestion of the United States Court of Military Appeals decision in *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983) which in turn was based upon the United States Surpeme Court decision in *Furman v. Georgia*. Thus, I do not contest the finding of my Brothers in the majority that the procedures set forth in R.C.M. 1004(a), (b), (d) and (e) meet the requirements the Supreme Court mandated before imposition of the death penalty could be considered constitutional. I believe, however, that the only Governmental authority that can identify, at least as they relate to aggravating factors, (*i.e.*, R.C.M. 1004(c)) and effectuate the standards for impositon of the death penalty in accordance with the Supreme Court's mandate within the military justice system, as it is presently established, is the United States Congress. While Congress might be able to delegate the *Furman* mandate, it can only do so after meeting certain criteria, *United States v. Mistretta*, — U.S. —, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) citing *American Power and Light Co. v. SEC*, 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946),[1] which, at this point in

[1] As quoted in the recent Supreme Court decision of *Mistretta v. United States*, __ U.S. __, __, 109 S.Ct. 647, 652-54, 102 L.Ed.2d 714 (1989): "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibliity and practicality, which will enable it to perform its function.' *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421, 55 S.Ct. 241, 248, 79 L.Ed. 446 (1935). Accordingly, this Court has deemed it 'constitutionally sufficient' if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power and Light Co. v. SEC*, 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946).

time, it has not met. accordingly, I find that the imposition of the death penalty upon a military accused convicted within the military justice system is unconstitutional under the principles announced in *Furman v. Georgia*, (hereinafter *Furman*) and *United States v. Mistretta*. I shall explain in more detail below. With regard to the eighth assignment of error, the appropriateness of the imposition of the death penalty in appellant's case, I dissent only because I cannot reach a consideration of that issue since I am not convinced that the death penalty is a valid punishment or that the guidelines set forth in R.C.M. 1004(c) are authorized and appropriate guidelines.

I.

Furman v. Georgia

Furman declared that existing state capital punishment statutes violated the Eighth Amendment because they permitted exercise of uncontrolled discretion by sentencing authorities in determining whether to impose capital punishment in any specific case. *United States v. Matthews*, 16 M.J. at 369. Subsequently in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. at 2920, 49 L.Ed.2d at 859 (1976) (hereinafter *Gregg*), the Supreme Court examined the new (post-*Furman*) Georgia statute which retained the death penalty for six categories of crime. In addition to the six categories of crime for which the legislature retained the death penalty, the Georgia legislature also adopted new trial procedures and capital sentencing guidelines that it mandated be followed before imposition of the death penalty upon one convicted of a capital offense was authorized. For example, the Georgia statute established a bifurcated trial, including a separate sentencing stage wherin evidence in aggravation, extenuation, and mitigation of the crime was presented. Additionally, the judge was required to instruct the jury as to any of 10 statutory aggravating circumstances that were supported by the evidence and that it,

the jury, must find, and specify, at least one of the ten aggravating circumstances beyond a reasonable doubt before they could adjudge the death penalty. Finally, the new statute required expedited and automatic direct review by the state supreme court.

The Supreme Court upheld the new Georgia statute as passing constitutional muster because the jury's attention had been focused "on the particularized nature of the crime and the particularized characteristics of the individual defendant." *Gregg,* 428 U.S. at 206, 96 S.Ct. at 2940, 49 L.Ed.2d at 893. In particular the Court was impressed with the channeling of the jury's discretion such that the jury could not impose the death sentence in a wanton and freakish manner. The Supreme Court arrived at the same conclusion with regard to Florida's reenacted statute. *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, *reh'g den.* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976).

II.

Impact of *Furman* On Article 118, UCMJ

What, then, is the status of Article 118, UCMJ? In 1950 Congress enacted Article 118, Uniform Code of Military Justice, 10 U.S.C. § 118. That article defines the offense of murder within the military community. Within that statute Congress identified four specific types of murder of which two, premeditated murder [Article 118(1)] and murder committed during the commission of certain felonies [Article 118(4)], were designated capital offenses. The other two types of murder, death as a result of an act done with the intent to kill or inflict great bodily harm [Article 118(2)] and death resulting from an act inherently dangerous to others [Article 118(3)], were designated as offenses punishable "as a court-martial may direct."[2] *See* R.C.M. 1003(b).

[2] The legislative history to Article 56, UCMJ, wherein the Congress gave the President broad authority to set the maximum punishment for offenses which a court-martial may direct and which a court-martial could not thereafter exceed when directing punishment, clearly reveals that Congress never intended the President to deal in any way with the death penalty. In fact, the hearings relating to Article 56, in particular reveal concern that the wording of the provisions be carefully articulated so that assurance could be had that the President could never make an offense a capital offense that the Congress itself had not declared capital. Index and Legislative History of the Uniform Code of Military Justice, HH at 1187.

Offenses punishable "as a court-martial may direct" have generally been understood to carry any punishment exclusive of death, *see, e.g.,* para. 127(c), (Article 118) MCM, 1969; para. 43(e), Part IV, MCM, 1984, and exclusive of those punishments deemed cruel and unusual under Article 55, UCMJ, Article 118 has not been amended since the enactment of the UCMJ. Thus, Article 118 is a pre-*Furman* statute.[3]

The next step is to determine what impact the Supreme Court's decisions in *Furman* and *Gregg* have on pre-*Furman* statutes, such as Article 118, in which the death penalty is authorized but fails to set forth *Furman-Gregg* type guidelines.[4] In other words, what is the status of Article 118 in view of *Furman*?

[3] By analogy then, Article 118—and any other death penalty offenses within the UCMJ, with the exception of Article 106a—should be in the same status as those state statutes which *Furman v. Georgia* declared unconstitutional. Since *Furman*, at least 35 of those states having *Furman*-invalidated statutes, have, through the positive action of their legislatures, taken action to reinstate the death penalty for some offenses and provide the guidelines required by *Furman. E.g., Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, *reh'g den.* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976).

[4] We do recognize, as the Court of Military Appeals did in *Matthews,* that many of the procedures within the military justice system, such as a bifuracted trial and the opportunity to present aggravating, extenuating and mitigating evidence on sentencing, probably meet some of the Supreme Court's concerns. The court-martial process did not, however, address the concept of finding and weighing aggravating and mitigating factors by some identified standard such that unfettered, and possibly discriminatory, discretion was not controlled.

I believe the concurring and dissenting opinions in *Furman* clarify its impact on Article 118's status.[5] First, let us look at the concurring opinions that provide the narrowest grounds for the majority's opinion. Justice Stewart concurred in reversing Furman's sentence to death because he believed that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310, 92 S.Ct. at 2763, 33 L.Ed.2d at 390. Justice White, also concurring, stated:

> . . . [A]s the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.
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> . . . . . .
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> In this respect, I add only that past and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may

[5] We must look at the various concurring and dissenting opinions to attempt to elicit the intended impact of *Furman* because no unified majority opinion explaining the result was arrived at by the Court. Accordingly, what other way can we determine the exact intent of the Court other than to glean from the concurring and dissenting opinions what the Court as individuals believed was the impact of the decision. *See Gree v. Georgia*, 428 U.S. at 169, n. 15, 96 S.Ct. at 2909 n. 15, 49 L.Ed.2d at 859, n. 15 (1976); *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); Annotation, "Supreme Court's Views on Constitutionality of Death Penalty and Procedures Under Which It Is Imposed." 51 L.Ed. 886; Annotation, "Binding Effect Upon State Courts of Opinion of United States Supreme Court Supported by Less Than Majority of All Its Members." 65 ALR3d 504.

> refuse to impose the death penalty no matter what the circumstances of the crime. Legislative "policy" is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them. In my judgment what was done in these cases violated the Eighth Amendment.

408 U.S. at 313-314, 92 S.Ct. at 2764, 33 L.Ed.2d at 392-393.

Now let us turn to the dissenters. Chief Justice Burger stated in his dissent:

> The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is not entirely clear. This much, however, seems clear: if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past.

408 U.S. at 397, 92 S.Ct. at 2807, 33 L.Ed.2d at 440.

The Chief Justice went on to say:

> While I would not undertake to make a definitive statement as to the parameters of the Court's ruling, it is clear that if state legislatures and the Congress wish to maintain the availability of capital punishment, significant *statutory* changes will have to be made. . . . (Emphasis added.) [L]egislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed.

408 U.S. at 400, 92 S.Ct. at 2809, 33 L.Ed.2d at 442. Finally, the Chief Justice stated:

> Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and unambiguous answer on the basic constitutional question, *the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress.* (Emphasis added.) While I cannot endorse the process of decision making that has yielded today's result and the restraints that result imposes on legislative action, I am not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment. If today's opinions demonstrate nothing else, they starkly show that this is an area where legislatures can act far more effectively than courts.

408 U.S. at 403, 92 S.Ct. at 2811, 33 L.Ed.2d at 444. Also dissenting was Justice Powell who wrote:

> Because of the pervasiveness of the constitutional ruling sought by petitioners, and accepted in varying degrees by five members of the Court, *today's departure from established precedent invalidates a staggering number of state and federal laws.* (Emphasis added.) The capital punishment laws of no less than 39 States (footnote omitted) and the District of Columbia are nullified. In addition, *numerous provisions of the Criminal Code of the United States and of the Uniform Code of Military Justice also are voided.* (Emphasis added.) The Court's judgement not only wipes out laws presently in existence, but denies to Congress and to the lesiglatures of the 50 States the power to adopt new policies contrary to the policy selected by the Court. . . .

> [T]he impact of the majority's ruling is all the greater because the decision encroaches upon an area squarely within the historic prerogative of the legislative branch—both state and federal—to protect the citizenry through the designation of penalties for prohibitable conduct. It is the very sort of judgment that the legislative branch is competent to make and for which the judiciary is ill-equipped.

408 U.S. at 462-463, 92 S.Ct. at 2840, 33 L.Ed.2d at 418.

Justice Blackmun, dissenting, found:

> Not only are the capital punishment laws of 39 States and the District of Columbia struck down, but also all those provisions of the federal statutory structure that permit the death penalty apparently are voided. No longer is capital punishment possible for [various federal crimes listed in Title 18 U.S.Code]. Also in jeopardy, perhaps, are the death penalty provisions in various Articles of the Uniform Code of Military Justice. 10 USC §§ 885, 890, 894, 901, 904, 906, 913, *918*, and 920. (Emphasis added.) All these seem now to be discarded without a passing reference to the reasons, or the circumstances, that prompted their enactment, some very recent, and their retention in the face of efforts to repeal them.

408 U.S. at 412, 92 S.Ct. at 2815, 33 L.Ed.2d at 449.

From these dissents, it would appear that at least four justices of the Supreme Court believed that *Furman* declared all state and federal statutes, including the UCMJ, null and void if they authorized the imposition of the death peantly but did not meet the standards identified by *Furman.*[6] The Ninth Circuit Court of

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[6] Even though three of the justices who participated in *Furman* are no longer members of the Court, six of the *Furman* Court do remain and might

Appeals was compelled to reach the same conclusion in *United States v. Harper,* 729 F.2d 1216 (9th Cir.1984). In fact, it based it conclusion on the position not only of petitioner, but also of the Government, whose brief on this issue in the district court stated that Title 18 U.S.C. § 794's death penalty provision is:

> . . . uneforceable and void because it sets forth no *legislated* guidelines to control the fact-finder's discretion. (Emphasis added.) The Department of Justice has long been of the view that *Furman* rendered section 794's death penalty provision unconstitutional. *See Imposition of capital Punishment:* Hearings on S. 1, S. 1400, and S. 1401 Before the Subcomm. on Criminal Laws and Procedures of the Comm. of the Judiciary, 93d Cong., 1st Sess. 43 (1973) (statement of Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Department of Justice); To Establish Constitutional Procedures for the Imposition of Capital Punishment: Hearings on S. 1382 Before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary, 95th Cong., 1st Sess. 22 (1977) (statement of Mary Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice); Capital Punishment: Hearings on S. 114 Before the Comm. of the Judiciary, 97th Cong., 1st Sess. 22 (1981) (statement of D. Lowell Jensen, Assistant Attrorney General, Criminal Division, Department of Justice). Moreover, the Senate has recently

continue to represent a majority should the constitutionality of Article 118's death penalty be presented. In playing the numbers game then, we know that of those six remaining justices, two justices would declare the death penalty unconstitutional per se; one justice would not declare the death penalty unconstitutional per se but would declare discretionary statutes unconstitutional; and four justices believe the *Furman* decision declares the death penalty statutes in existence at the time of the opinion null and void.

> passed a bill, supported by the Justice Department, that would authorize the imposition of the death penalty for certain crimes, including espionage. S. 1765, 98th Cong., 2d Sess., 130 Cong.Rec.S. 1491-93.
>
> In light of the above, we believe it clear that the death penalty provision of the espionage statutes is unconstitutional. It cannot be saved by judicial formulation of the missing, but essential, statutory guidelines.

729 F.2d at 1225-6. *See McKenzie v. Risley,* 801 F.2d 1519 (9th Cir.1986), *cert. denied* __ U.S. __, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988).

Additionally, the decisions of the federal circuit courts, *e.g., United States v. Watson,* 496 F.2d 1125, 1129 (4th Cir.1973) and *United States v. McNally,* 485 F.2d 398 (9th Cir.1973) (*en banc*), reflect the two differing rationales state and federal courts have utilized for analyzing the continuing constitutional validity of statutes related to the imposition of the death penalty in light of *Furman.*[7] *Watson* sides with the classification rationale while *McNally* reflects the penalty rationale.[8]

[7] Annotation, "Effect of the Abolition of Capital Punishment on Procedural Rules Governing Crimes Punishable by Death—Post-*Furman* Decisions." 71 A.L.R.3d 454, 457-460.

[8] The *Watson* court was concerned with the impact of *Furman* on a federal statute that gave the defendant a procedural right to two attorneys if he faced the possibility of the imposition of the death penalty. Since it was unable to determine that the sole reason Congress gave the accused the procedural right in question was because of the possibility of the imposition of the death penalty, a possibility that no longer existed, it refused to hold the procedural right inapplicable to a defendant convicted under the statute which Congress had done nothing about since *Furman.* Thus, *Watson* looked at the death penalty provision as a not only a penalty provision that may or may not be capable of imposition but as a means for classifying an

These judicial decisions shed some light on how we might interpret the status of Article 118 as a whole, or the status of its provision authorizing imposition of the death penalty in particular. The courts that follow the classification rationale hold that the statutes identifying offenses as "capital offenses" established a category of offenses that because of their gravity remained classified as "capital offenses." That being so, all statutes that interrelated to a "capital offense" statute remained operative if a capital offense was involved. The courts using the penalty ratio-

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offense as one of the most severe types of offenses.

> We have no doubt that *Furman* raises pointed legislative questions of whether section 3005 should not be repealed or whether the various provisions of Title 18 which purport to authorize the imposition of the death penalty should be amended in an effort to harmonize them or to validate them under *Furman*. . . . But we conceive these to be legislative questions and not judicial ones, especially when a holding by us that *Furman* has effected a repeal of section 3005, of necessity, would probably create serious doubt as to whether the various other provisions of Title 18 and the Federal Rules of Criminal Procedure, to which we have referred, have also been repealed. The question of whether these statutes and the rule should now be repealed merits the prompt consideration of Congress and the Rules Committee, but we regard our role as one of proceeding with caution unless and until it unmistakably and clearly appears that *Furman* has had this effect. This, we fail to find.

Watson, 496 F.2d at 1129-1129. The Court then held that the defendant had the statutory right to have two attorneys because he was facing conviction for a crime that authorized the death penalty even though the imposition of the death penalty under federal law as it existed at that time was ineffectual.

McNally, on the other hand, determined that when the death penalty has been determined by a court or the prosecution not to be appropriate because of *Furman*, "the case lost its capital nature" and the defendant was not entitled to the advantage of any procedure which was otherwise required in the prosecution of a capital offense. *McNally*, 485 F.2d at 407. Thus, *McNally* looked at the death penalty provision as solely a penalty provision.

nale declare that since capital punishment provisions were no longer constitutional unless they met current schemes offered by the judiciary, the "capital offense" no longer existed. Thus, any legislation that was triggered by the possibility of imposition of the death penalty was not operative until that penalty was again constitutionally imposable. Hence, while the death penalty may be authorized by the legislature, its imposition is constitutionally prohibited; the authorization provision is invalid.

I can accept the penalty rationale more readily then I can the classification rationale because of the concept of severability. It is well-established that a statute may be constitutional in part and unconstitutional in another; and, as long as the unconstitutional provision is severable from the rest of the statute, the constitutional provision will stand with its unconstitutional aspect rejected. *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). But regardless of which rationale one accepts, I believe little argument remains with the fact that *Furman*, at the very least, declared all provisions of statutes authorizing imposition[9] of capital punishment existing at the time of the decision ineffectual. *Gregg v. Georgia*, 428 U.S. at 153, 96 S.Ct. at 2920; *Watson*, 496 F.2d 1125; *In re Ex Parte Bynum*, 294 Ala., 78, 312 So2d 52 (1975).

All of this precedent tells me that the federal and state courts have exercised caution when called upon to interpret the impact of *Furman* on a statutory authorization for imposition of the death penalty. Where legislatures have not specifically and affirmatively indicated their intent since *Furman* to authorize imposi-

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[9] The key word here is "imposition". *Furman*, at the very least, declared imposition of the death penalty outside its guidelines unconstitutional. The death penalty was still authorized but its imposition, the ability to effectuate it, was possible only after the development of specific and controlled discretionary guidelines and procedures and the application of those guidelines and procedure by the authorized fact-finder.

tion of the death penalty by reenacting, reinstating, modifying, or, in some other permissible way, validating the authorization provision in question, these courts have also exercised caution when they have had to determine the applicability of statutes that grant or deny a defendant a procedural right that is dependent upon him facing the possibility of the imposition of the death penalty. In light of this exercise of caution, I believe this Court should also exercise caution in interpreting legislative inaction or implicit ratification of the U.S. Congress when determining whether Article 118's authorization for the imposition of death remains valid since the decision in *Furman.* Although appellate courts act on the presumption of constitutionality of statutory provisions, because the case law since *Furman* has not made it unmistakably clear to me that Article 118's death penalty authorization provision is constitutional, I cannot find that it is constitutional. *See United States v. Watson,* 496 F.2d 1125, 1129 (4th Cir.1973). If it is not a constitutionally valid provision because Congress has not affirmatively demonstrated its reinstatement of that penalty provision, let alone given the guidelines required by *Furman-Gregg,* then the imposition of the death penalty within the military justice system is unconstitutional.

III.

Presidential Effectuation Of An Invalid Statutory Provision

Let us presume, however, that Article 118's provision authorizing the death penalty is not void but merely ineffectual. How can it be effectuated? In this particular case, can the President pursuant to Article 36, UCMJ, effectuate, *i.e.*, make consitutionally permissible, Article 118's authorization for imposition of the death penalty, by promulgating R.C.M. 1004?

In *United States v. Matthews,* 16 M.J. at 354, the Court of Military Appeals held that the sentencing standards then existing under the UCMJ were defective because they failed "to require

that the court members make specific findings as to individualized aggravating circumstances—findings which can, in turn, be reviewed factually and legally." *Id.,* at 380. In dicta the Court then indicated how the defective sentencing standards could be corrected:

> Congress can take action to remedy this defect that now exists in the sentencing procedure employed by courts-martial in capital cases. However, corrective action also can be taken by the President in the exercise of his responsibilities as commander-in-chief under Article II, Section 2, and of powers expressly delegated to him by Congress. *See* Article 36, UCMJ, 10 U.S.C. § 836.

The Court further expounded on its theory that the President could take the corrective action needed:

> The congressional delegation of powers to the President has traditionally been quite broad in the field of military justice. Pursuant to Article 36 of the Uniform Code, the President promulgates rules to govern pretrial, trial, and post-trial procedures of courts-martial. Unlike other Federal criminal statutes, the punitive articles of the Uniform Code for the most part authorize punishment "as a court-martial may direct"; no maximum or minimum sentence is specified. (Footnote omitted.) However, as contemplated by Article 56, of the Uniform Code, 10 U.S.C. § 856, the President prescribes maximum punishments for the various offenses. (Citation omitted.) The great breadth of the delegation of power to the President by Congress with respect to court-martial procedures and sentences grants him the authority to remedy the present defect in the court-martial sentencing procedure for capital cases. *Cf. Youngstown Sheet and Tube Co. v. Sawyer,* 343

> U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). Indeed, a proposed revision[10] of the Manual for Courts-Martial, which [is] . . . R.C.M. 1004 . . . prescribes special procedures for sentencing in capital cases.

Matthews, 16 M.J. at 380-381. (Footnote added).

The President heeded the *Matthews* dicta and promulgated R.C.M. 1004. Despite our surpervisory court's dicta in *Matthews*, and its apparent anticipatory sanction of the President's action, I believe there is a separation of powers issue that the Court of Military Appeals may not have considered at the time. Additionally, I believe significant case law addressing the separation of powers issue has been decided since *Matthew, see Mistretta v. United States*, __ U.S. __, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989); *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); *Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986); *United States v. Harper*, 729 F.2d 1216 (9th Cir.1984), that impacts upon the continued validity of the dicta such that it may reexamine *Matthews*. *See United States v. Carter*, 25 M.J. 471, 473 (C.M.A.1988).

Elementary civics teaches us that:

> . . . the executive department, like the judicial, must yield in most matters to the creative power of the legislature (footnote omitted); the legislature makes laws and the executive enforces them when made, and each department is, in the main, supreme within its own field of action (footnote omitted). The executive cannot discharge the functions of the legislature in any manner by so acting in his official capacity that his

[10] The proposed revision of the Manual for Courts-Martial mentioned by the Court of Military Appeals in *Matthews* referred to what ultimately became Rule for Courts-Martial (R.C.M.) 1004, Manual for Courts-Martial (MCM), 1984.

> conduct is tantamount to a repeal (. . . *Henry v. State*, 10 Okla.Crim. 369, 136 P. 982), enactment (*Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 72 .Ct. 863, 96 L.Ed. 1153 . . . ;) variance, or enlargement (*Whitcomb Hotel, Inc. v. California Employment Com.*, 24 Cal.2d 753, 151 P.2d 233, 155 A.L.R. 405; *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797, *cert. den.* and *app dismd* 280 U.S. 517, 50 S.Ct. 66, 74 L.Ed. 587, and *cert. den.* and *app dismd* 280 U.S. 517, 50 S.Ct. 66, 74 L.Ed. 588). Thus, the President of the United States has no authority, even under the clause requiring him to see that the laws are faithfully executed, to suspend of his own motion the operation of acts of Congress (*Kendal v. United States*, 37 U.S. 524, 9 L.Ed. 1181).

16 Am.Jur.2d sec. 305 at 821-822.

Just as the President cannot legislate, neither can the courts by judicial construction. *See United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). As the majority notes in its equal protection discussion: "In *Gregg* the Supreme Court reasoned that because of the complex issues involved in determining the moral values of society and the social utility of the death penalty, it is particularly within the province of the legislature to establish the degree of punishment for certain classes of crime." This, for me includes, factors that differentiate capital murder from non-capital murder.

Whether an unconstitutional provision of a death penalty statute can be subsequently effectuated with corrective action has been answered affirmatively by *Gregg v. Georgia*, 428 U.S. at 206, 96 S.Ct. at 2940, and *Profitt v. Florida*, 428 U.S. at 242, 96 S.Ct. at 2960, when the Supreme Court approved new statutes enacted by the state legislatures subsequent to *Furman*. The new legislation reaffirmed the legislative policy of the appropriate-

ness of the imposition of the death penalty as to certain categories of crime and channeled the decisionmaking for imposition of the death penalty by establishing certain specified aggravating factors and several procedural safeguards. Positive action to establish or reaffirm policy and to establish standards for channelling decision-making in an attempt to make law as to crime and punishment in compliance with the Constitution is beyond question the sole province of the legislature. *United States v. Wiltberger*, 18 U.S. 76, 5 Wheat. 76 (1820). As with many of Chief Justice Marshall's opinions, the principle he enunciated about the power to legislate being within the sole province of the legislature has remained good law through the years. *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1954); *United States v. Evans*, 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1948); *Howell v. Mississippi*, 300 So.2d 774 (1974).

My Brothers give four reasons for their belief that the President can validate the ineffectual provisions of Article 118. First, they rely on the Congressional enactment, unchanged since 1951, of Article 36, UCMJ, which they believe delegates to the President that authority:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be

> reported to Congress.[11]

Second, they rely on what they consider the expression of congressional intent with regard to the President's authority to set punishments, including the death penalty, as explicitly set forth in Article 56, UCMJ: "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."[12] The third reason is what they believe is recognition of the authority of the President to do so by the Court of Military Appeals in their decision in *Matthews*, 16 M.J. at 354; the President's implementation of that advice; and the Congressional ratification, albeit *sub silentio*, of the provision in question.[13] Finally, the majority believes that the President has been properly delegated broad authority to effectuate Article 118's death penalty provision because the President's authority as Commander-in-Chief of the Armed Forces is based upon a long-standing special relationship with the Congress, an historical relationship so unique from any other, that he alone has the expertise to determine what is necessary to maintain morale and discipline within the military. This special relationship, they conclude, enables the President to meet the *Furman* mandate better than any other mechanism.

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[11] Some of my Brother judges believe that the President has merely "applied the principles . . . recognized in the trial of criminal cases in the United States district courts, . . ." and that those principles are the guidelines established by the Supreme Court in *Furman* and *Gregg*. My counter-argument is that the courts, including the United States Supreme Court, have recognized that they cannot legislate. *United States v. Harper*, 729 F.2d 1216 (9th Cir.1984); *see e.g., Furman*, 408 U.S. at 398, 92 S.Ct. at 2808 (Burger, C.J., dissenting).

[12] The Table of Maximum Punishments, paragraph 127(c), Manual for Courts-Martial, 1951, and 1969, show the President referring to Article 118 for a definition of the maximum punishment permitted for murder rather than him stating it in his own terms as the maximum sentence permissible.

[13] Provisions of the Manual for Courts-Martial made pursuant to Article 36, UCMJ, must be reported to Congress. Article 36(b), UCMJ.

I do not accept those reasons because of two long standing principles: (1) Congress cannot delegate its legislative power to the President (the nondelegation principle); *Marshall Field and Co. v. Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892);[14] and (2) penal rules must be strictly construed.[15]

In *United States v. United Verde Copper Co.*, 196 U.S. 207, 25 S.Ct. 222, 49 L.Ed. 449 (1905), the Supreme Court applied the nondelegation principle to the executive branch. In *United Verde* the Secretary of the Interior had established regulations under the supposed authority of Congress to implement an act of Congress. In doing so, he tried to give "an authoritative and final construction of the statute" and in doing that the Court said:

[14] Two important facts to remember in this regard are the constitutional provisions speaking about the legislative and executive branch responsibilities toward the armed forces. Article I, section 8, clause 14 states that "The Congress shall have the Power . . . To make Rules for the Government and Regulation of the land and naval Forces." Article II, section 2 states: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States. . . ."

[15] "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. 76, 5 Wheat. (U.S.) 76, 95, 5 L.Ed. 37, 42 (1920); *Furman v. Georgia*, 408 U.S. at 452-453, 92 S.Ct. at 2835-36 (Powell, J., dissenting). Additionally, "[t]he Supreme Court is most likely to reject broad delegations of congressional power, typically on statutory grounds, when action of the government agency claiming delegated power touches constitutionally sensitive areas of substantive liberty." Tribe, AMERICAN CONSTITUTIONAL LAW, (2d Edition, 1988) at p. 365. What more constitutionally sensitive area of substantive liberty can there be than an individual's life? *See California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) and cases cited in n. 9, *e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 117-8, 102 S.Ct. 869, 877-8, 71 L.Ed.2d 1 (1982).

> If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation: it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary.

196 U.S. at 212, 25 S.Ct. at 225.[16]

In *Reid v. Covert*, 354 U.S. 1, 38-39, 77 S.Ct. 1222, 1241-42, 1 L.Ed.2d 1148, 1172 (1957), the President's authority to act in his capacity as Commander-in-Chief with regard to the administration of military justice specifically was addressed:

> It must be emphasized that every person who comes within the jurisdiction of courts-martial is subject to

[16] In *United States v. Grimaud*, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911), the Supreme Court upheld the action of the Secretary of Agriculture's use of his legislatively delegated powers in making criminal the violation of rules and regulations made and promulgated by him under the authority of a statute covering forest reservations. The Court reiterated that only Congress can legislate and quoting its previous opinion in *Marshall Field and Co. v. Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892) stated:

> The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside the halls of legislation.

Grimaud, 220 U.S. at 519, 31 S.Ct. at 484, 55 L.Ed. at 569. The Court then explained that while the act of Congress in question did not expressly declare the particular activity in question unlawful, the statutes involved did have encompassing terms ;and expressly stated that failure to comply with the rules and regulations of the Secretary would subject the offender to the penalty imposed by Congress.

military law—law that is substantially different from the law which governs civilian society. Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice. Moreover, it has not yet been definitely established to what extent the President, as Commander-in-Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law as well as the procedures of military courts in time of peace, or in time of war. . . . If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.

In summary, "it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." In part this is attributable to the inherent differences in values and attitudes that separate the military establishment from civilian society. In the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual. (Footnotes omitted). The President's authority as head of the executive branch and as Commander-in-Chief is, therefore, not unfettered authority.

See also Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 671, 100 S.Ct. 2844, 2878, 65 L.Ed.2d 1010, 1052 (1980); *Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 543, 101 S.Ct. 2478, 2507, 69 L.Ed.2d 185, 222 (1981).

Using these principles to analyze the authority of the President by virtue of Article 36 to promulgate R.C.M. 1004, we must address two issues. First, anticipating that the Supreme Court's recognition that there are "inherent differences in values and attitudes [which] exist that separate the military establishment from the civilian society" might be considered a means by which the President could be "inferred" to understand "the intent" of Congress and thus allow him, under the rubric of his special relationship with Congress, to effectuate *Furman-Gregg* criteria for the imposition of the death penalty, let us examine Article 118 to see if there are inherent differences that would separate the former from the latter. In other words, do inherent differences in values and attitudes exist that separate the military from the civilian community such that imposition of the death penalty in the former and the not the latter is constitutionally permissible? I have no doubt that they do. But, I do doubt, that the differences, at least during peacetime, are so inherent that Congress need not itself establish *Furman-Gregg* criteria.[17]

I am not at all certain that murder, at least the two types of murder that concern us in appellant's case,[18] or even the particular circumstances surrounding the commission of that offense by this particular appellant as alleged, including the aggravating factors plead and found in the charge and specifications, identify

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[17] On the other hand, if we could identify a difference in values and attitudes, then, maybe, Presidential action in establishing the aggravating factors in R.C.M. 1004(c) would be justified.

[18] Premeditated murder (Article 118(1)) and murder during the commission of a felony (Article 118(4)).

any values or attitudes so different as to separate the military establishment from the civilian society. In fact, I believe the Court of Military Appeals has already addressed this issue.

In *United States v. Matthews*, 16 M.J. at 354, the Court recognized that circumstances might exist which would permit rules governing capital punishment to be different from those applicable to civilians. But, in Matthews' situation, the murder and rape of a civilian dependent, offenses which the court was unable to relate to military exigencies, the Court found:

> [N]o reason why Matthews should be executed for his [crimes] if the sentencing procedures used by the court-martial failed to meet the standards established by the Supreme Court for sentencing in capital cases in civilian courts. There is no military necessity for such a distinction; and we do not believe that applying lower standards in this case would conform to the intent of Article 55 or of the Eighth Amendment.

Matthews, 16 M.J. at 369.[19] The only difference between Matthews and appellant is that the President has since promulgated R.C.M. 1004. Otherwise, the offense of murder is the same.[20] Thus, I do not believe that sufficient differentiating values and attitudes have been adequately identified, let alone identified as inherent, to permit the death penalty to be effectuated by the President rather than by the Congress.

[19] Recognizing that the Court of Military Appeals made this statement in applying the principle to the issue of cruel and unusual punishment rather than a delegation of power issue, it would seem to me that the same type of justification would have to be used under an equal protection argument if proper authority did establish procedures for imposition of the death penalty for service members that differed from that of their civilian counterparts. I do not address, therefore, the issue of whether military status alone is sufficient to overcome any equal protection arguments to permit the imposition of the death penalty on service members and not civilians for offenses committed under the same nine similar circumstances.

[20] One could argue that the primary victim in appellant's case is his officer-in-charge and his dependent civilian wife while Matthews murdered a civilian dependent of an Army officer. The status of appellant's victim as officer-in-charge could have been one of the aggravating factors under the President's scheme but was not plead. Thus, the victim's officer status, which might have created that military significance, was not used by the Government at trial and cannot now be used as a means to differentiate appellant's case from Matthews' situation on the basis of a special need of the military.

IV.

Is There A Proper Delegation?

Even if, based on the facts of this particular case, those differentiating values and attitudes are identified adequately and are inherent to the military, the process by which that identification is validated must be by a proper delegation.[21] There is nothing in the congressional delegation in Article 36, UCMJ, that can be pointed to that would demonstrate that the identification of the differentiating values and attitudes was proper. *See United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); *O'Neal v. United States*, 140 F.2d 908 (6th Cir. 1944).

It may well be true that the standards set forth in R.C.M. 1004 meet the guidelines set forth in *Gregg v. Georgia*, 428 U.S. at

[21] As we have previously noted, the military justice system is dependent upon both the legislative and executive branch for its creation and effectuation. *See* Footnote 14. Therefore, since Congress was endowed with the authority "to make rules and regulations for the governing" of the armed services, that Congress legislates and the President, as head of the executive branch and as commander in chief of the armed forces, enforces that legislation. Where Congress has failed to express an intent to require certain action, *e.g.*, require the taking of an oath to demonstrate bona fides at the time of submission of an application to an executive agency, the executive could not then prescribe that violation of the requirement would result in criminal penalty. *Williamson v. United States*, 207 U.S. 425, 28 S.Ct. 163, 52 L.Ed. 278 (1907).

153, 96 S.Ct. at 1909, *e.g.*, aggravating factors and procedural safeguards are present; and, it would appear that the concerns of the Court of Military Appeals have been eliminated. But, the President's arbitrary promulgation of such rules without guidance from the legislature that results in the effectuation of an otherwise constitutional statutory provision is not a proper application of the delegation process. *See The Aurora v. United States*, 11 U.S. 382, 7 Cranch 382, 3 L.Ed. 378 (1813). In the numerous cases cited by the Supreme Court since *Aurora*, those that upheld a statutory delegation on grounds that the acts complained of were not a result of improper delegation, were based on statutes that had provided specific guidelines upon which the President was to base his action and which prevented the executive from taking what the courts considered arbitrary action; and most importantly, the President or a member of the executive branch took his action in accordance with those statutory guidelines. *See, e.g., Union Bridge Co. v. United States*, 204 U.S. 364, 27 S.Ct. 367, 51 L.Ed. 523 (1907); *Marshall Field and Co. v. Clark*, 143 U.S. at 649, 12 S.Ct. at 495; *United States v. Gordon*, 580 F.2d 827 (5th Cir. 1978); *United States v. Pastor*, 557 F.2d 930 (2d Cir. 1977). *See also* Annotation, "Validity of Statute or Ordinance Vesting Discretion in Public Officials without Prescribing a Rule of Action," 92 A.L.R. 400; Annotation, "Validity of Delegation to Drug Enforcement Administration of Authority to Schedule or Reschedule Drugs Subject to Controlled Substance Act (21 U.S.C. §§ 801 et seq.)," 47 A.L.R.Fed. 869.

In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935), the Supreme Court established a three-stepped analysis to determine whether the President's authority, exercised in light of a congressional delegation, was too broad:

> . . . we look to the statute to see whether the Congress has declared a policy with respect to that subject, whether the Congess has set up a standard for the President's action, whether the Congress has required

> any finding by the President in the exercise of the authority to enact the prohibition.

293 U.S. at 415, 55 S.Ct. at 246, 79 L.Ed. at 456. The Supreme Court recently breathed new life into *Panama* in the realm of criminal punishments. *Mistretta v. United States*, — U.S. —, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Using *Panama's* three-stepped analysis as recently applied by *Mistretta*, I find Articles 36, 56, and 118 itself so deficient that reliance on an Article 36 delegation as a proper congressional delegation to the President for effectuating guidelines that would authorize the imposition of the death penalty within the military justice system is misplaced and improper. This is particularly so when such a delegation relates to the imposition of the supreme and ultimate penalty.[22]

First, I do not believe that Congress has set a policy with regard to the imposition of the death penalty for Article 118 since *Furman*. In fact, the only offenses for which the Congress has been able to obtain a consensus for imposition of the death penalty in appropriate circumstances have been in connection with air piracy [49 U.S.C.A. §§ 1472(i)(1)(B), 1472(n)(1)(B)] and espionage by military personnel [Article 106a, UCMJ, 10 U.S.C. § 906a]. *See Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245 (9th Cir. 1988); *see also Thompson v. Oklahoma*, — U.S. —, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (O'Connor, J., concurring in judgment). My failure to presume that Congress has set a general death penalty policy is also based on recognition of the public controversy surrounding capital punishment, at least as to some offenses, and the reluctance of the federal courts and the United States Sentencing Commission to presume the will of

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[22] And, it is only to the imposition of the death penalty that my dissent applies. I offer no comment on the validity of the delegation with regards to other matters that may arise within the military justice system at a later time.

Congress in light of possible adverse congressional reaction. *See Gubiensio-Ortiz*, 857 F.2d at 1256.

Second, I do not believe that we can presume, as the majority would have us, that because of a presidential reporting requirement, the Congress has given tacit approval or has ratified the presidential promulgation of R.C.M. 1004. The Supreme Court has clearly stated that when "substantial restraints are being placed on constitutional procedures" and they are "in conflict with our long-accepted notions of fair procedures, such action must be based upon explicit, not implicit, authority. Such decisions cannot be assumed by acquiescence or non-action." *Greene v. McElroy*, 360 U.S. 474, 507, 79 S.Ct. 1400, 1419, 3 L.Ed.2d 1377, 1396-97 (1959). The *Greene* Court further enunciated the significance of explicit action on the part of Congress:

> They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized (citation omitted), but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with the authority to decide them.

Id. at 507, 79 S.Ct. at 1419, 3 L.Ed.2d at 1397.

In *Greene v. McElroy*, the petitioner's work opportunities were being severely limited by the Department of Defense without affording him a hearing that comported with "our traditional ideas of fair procedures." In appellant's case, he is being subjected to the imposition of the death penalty without being afforded the constitutional assurance that imposition of such an extreme penalty is a current policy adopted by the branch of government established to determine such policy.

Thus, I conclude that Congress has not set a policy with regard to imposition of capital punishment in the military justice system since *Furman*. I further conclude, upon examination of Article 86, that no standards were set by the Congress with regard to what factors the President should apply in determining when the imposition of the death penalty would be authorized. As to the third step in a *Panama* analysis, I could conclude that the Presidential finding requirement has been met, since only the President can order the punishment of death executed. R.C.M. 1207; *see* Article 7(a), UCMJ. Therefore, having failed to meet two of the three steps required by *Panama*, I find that the President's authorization of imposition of capital punishment pursuant to findings made in accordance with R.C.M. 1004 is based upon an unconstitutional delegation of authority.

V.

Limitation Of Article 36, UCMJ

Throwing caution to the winds, however, let's do some further analysis by assuming that Congress did establish a death penalty policy, at least with respect to Article 118, and did intend to delegate to the President under Article 36, UCMJ, the ability to correct provisions of the UCMJ held ineffectual until the *Furman* mandate was complied with. The congressional delegation must still be examined because it must be capable of proper application by the President. In order to ensure that proper application, the delegation must establish certain standards for the President to follow when he acts pursuant to the delegation.[23]

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[23] For example, compare Article 36, UCMJ (quoted *infra*) with the Federal Sentencing Commission Act wherein the Congress set forth categories for determining offenses, categories for determining categories of defendants, four purposes, three goals, and a specific tool, etc. *See*

I find ~~that the~~ standards enunciated by Congress are either non-existent or very restrictive. When one examines the judicial opinions addressing delegation after *Panama,* and in particular when one examines the delegation by Congress to the Sentencing Commission, as described at great length in *Mistretta,* one finds the standards enunciated by the Congress must be specific and detailed.[24]

Looking at Article 36, however, I fail to find such specific and detailed standards. I do find that the matters which Congress delegated to the President are very general and involve matters of procedure, not matters involving substantive law.[25] *Ellis v. Jacob,* 26 M.J. 90 (C.M.A. 1988); *United States v. Frederick,* 3 M.J. 230 (C.M.A. 1977). This fact provides another ground for my conclusion that R.C.M. 1004 is an improper basis upon which to authorize imposition of the death penalty.

The aggravating factors set forth in R.C.M. 1004(c) are matters of substantive law and not procedure. Two Supreme Court opinions serve as the judicial authority for this conclusionary statement. *Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981) and *California v. Ramos,* 463 U.S. 992, 108 S.Ct. 3446, 77 L.Ed.2d 1171 (1988).

Gubiensto-Ortiz v. Kanahele, 857 F.2d at 1245, *see also* Annotation "Validity of Delegation to Drug Enforcement Administration of Authority to Schedule or Reschedule Drugs Subject to Controlled Substances Act (21 USC §§ 801 et seq.)," 47 ALR Fed 869.

[24] Sentencing Reform Act of 1984, as amended 18 U.S.C. § 3551 *et seq.* (1982 ed., Supp. IV), and 28 U.S.C. §§ 991-998 (1982 ed., Supp. IV).

[25] While we believe rules of evidence involve substantive law, the congressional delegation is a little more specific in that it directs the President to adopt rules that apply to trials in federal district courts—which we recognize as the Federal Rules of Evidence, rules enacted by the Congress, and upon which the Military Rules of Evidence were based, with some modification, due to the needs of the military law practice. Appendix 22, Analysis MCM, 1984.

In *Bullington* the Supreme Court referred to the Missouri statute that enacted death penalty legislation after the *Furman* decision as containing "substantive standards to guide the discretion of the sentencer" and affording "procedural safeguards to the convicted defendant." 451 U.S. at 433, 101 KS.Ct. at 1853, 68 L.Ed.2d at 275.[26] The statute that the *Bullington* court examined had two separate provisions. One addressed purely procedural

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[26] I disagree with the Government's contention and the majority's interpretation that the Supreme Court considered the aggravating factors procedural matters in *Dobbert v. Florida,* 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). The *Dobbert* Supreme Court was addressing the factual situation involving a change in the role of the judge and jury in the imposition of the death penalty. I agree that the change in the roles made by the Florida legislature involved procedural matters; but, a determination that a change in role is procedural is far different from determining that the identification of certain factors are sufficiently aggravating as to make an individual eligible for the judge or jury to impose the death penalty is also a procedural matter. Additionally, the Florida statute had previously passed constitutional muster, both as to the aggravating factors to be considered and the procedural application of determining the presence of aggravating factors before imposition of the death penalty was authorized *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, *reh'g den.,* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976).

Additionally, the Florida statute, which not only changed the role of judge and jury, but also identified aggravating factors which had to be found before the death penalty could be imposed, was enacted by the legislature and not by someone in the executive acting under a delegation of authority. Thus, no separation of power—improper delegation or usurpation of authority—issue was or could be raised by the defendant in *Dobbert.* The only issue of concern for the Court was whether the change in the Florida statute violated *ex post facto* principles. The statutory changes served to ameliorate the appellant's potential for imposition of the death penalty because it provided "significantly more safeguards to the defendant than did the old. . . . Hence, viewing the totality of the procedural changes wrought by the new statute, we conclude that the new statute did not work an onerous application of an *ex post facto* change in the law." 432 U.S. at 295-6, 97 S.Ct. at 2301, 53 L.Ed.2d at 358.

issues, such as the requirements for a bifurcated trial, the jury's requirement to hear additional evidence in extenuation, mitigation, and aggravation. Additionally, this provision provided the judge with guidelines as to what he was to instruct the jury and his role in the proceedings after jury had made its decision. The second provision of the statute dealt with the legislature's specification of 10 aggravating and 7 mitigating circumstances which the jury had to find in writing and be convinced beyond a reasonable doubt that "any aggravating circumstances or circumstances that it finds to exist are sufficient to warrant imposition of the death penalty." *Bullington*, 451 U.S. at 434, 101 S.Ct. at 1853, 68 L.Ed.2d at 276. After careful analysis of *Bullington*, I believe the Court's "procedure" label—as interpreted by appellate Government counsel in their argument before this court—was meant to apply to the change in procedure caused by the new legislation, *i.e.*, the new state statute gave the jury rather than the judge the responsibility for determining the presence of the statutorily created aggravating factors. The Court's "procedure" label had nothing to do with the establishment of the aggravating factors themselves. I base this conclusion on the fact that the Court expounded on its determination that the provisions of the statute almost equated to a trial on the merits, particularly with the use of the beyond a reasonable doubt standard. "By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, however, Missouri explicitly requires the jury to determine whether the prosecution has 'proved its case.' " 451 U.S. at 444, 101 S.Ct. at 1858, 68 L.Ed.2d at 282. As a result the Court stated that "it is the State, not the defendant, that should bear 'almost the entire risk of error.' " 451 U.S. at 446, 101 S.Ct. at 1859, 68 L.Ed.2d at 283. It thus held that the State was not entitled, at defendant's second trial, to attempt to prove the aggravating factors it had failed to prove at his first sentencing hearing since he had, in reality, been found not guilty beyond a reasonable doubt of those aggravating factors. R.C.M. 1004 is almost identical to that Missouri statute,

except for the specific agggravating and mitigating factors listed in the Missouri statute. Indeed, the Ninth Circuit Court of Appeals, *en banc*, recently held that Arizona's statute requiring the finding of aggravating factors beyond a reasonable doubt was unconstitutional because it placed with the trial judge the duty of finding the aggravating factor when it should have been the duty of the jury. The Court determined it should be the jury's decision because the aggravating factors were like elements of the offense. As such the defendant was entitled, in light of the Sixth Amendment, to a jury determination of the existence of those aggravating factors. *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988).

In *California v. Ramos*, Justice O'Connor, writing for a majority Court explained the Court's present interpretation of *Gregg*:

> In *Gregg* itself, the joint opinion of Justices STEWART, POWELL and STEVENS concluded that the Georgia sentencing scheme met the concerns of *Furman* by providing a bifurcated proceding, instruction on the factors to be considered, and meaningful appellate review of each death sentence. (citation omitted.) Satisfied that these *procedural* (emphasis added) safeguards "suitably directed and limited" the jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action," (citation omitted), the joint opinion did not undertake to dictate to the State the particular *substantive* (emphasis added) factors that should be deemed relevant to the capital sentencing decision. Indeed, the joint opinion observed: "It seems clear that the problem [of channeling jury discretion] will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." (Citation omitted.) ("The deference we owe to the deci-

sions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy' "). (Footnote: Moreover, in approving the sentencing schemes of Georgia, Florida, and Texas, the joint opinions of Justices Stewart, POWELL, and STEVENS did not substitute their views for those of the state legislatures as to the particular *substantive* (emphasis added) factors chosen to narrow the class of defendants eligible for the death penalty. . . .)

It would be erroneous to suggest, however, that the Court has imposed no *substantive* (emphasis added) limitations on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate.

463 U.S. at 1000, 103 S.Ct. at 3452-53, 77 L.Ed.2d at 1180.

The majority states that Article 36 "clearly delineates the general policy to prescribe pretrial, trial, and post-trial procedures for cases tried by courts-martial," and "clearly states that the authority is delegated to the President," and "does establish specific boundaries to limit the President's action under this provision" because the President "is bound to apply the principles of law recognized in criminal trials in the United States district courts." While I agree with that statement as far as it goes, the statement is flawed in that the United States district courts have no capital punishment principles to apply. Congress has not passed any federal legislation establishing *Furman*-type factors for federal capital offenses in general, but has for the specific crimes of aircraft piracy and espionage by military personnel; but in doing so, specified the aggravating factor(s) that had to be found before death could be imposed.

Although the United States district courts must follow the *Furman* mandate when interpreting capital punishment statutes,

as must we, the district courts—despite the validity or invalidity of any substantive-procedural distinctions—cannot establish the aggravating factors where none have been enacted by the Congress. *See United States v. Harper*, 729 F.2d 1216 (9th Cir. 1984). Likewise, if a federal district court cannot effectuate an unconstitutional death penalty provision, neither can the President, pursuant to Article 36, which requires him to follow, insofar as practicable, the principles of law recognized in trials of criminal cases in United States district courts. Article 36, UCMJ.

Furthermore, Article 36's delegation is additionally limited by Article 56, UCMJ, for while giving authority to the President to prescribe maximum punishments, it does so in terms of non-capital offenses. That the President's authority to prescribe maximum punishments is limited to non-capital offenses is supported not only by the legislative history of Article 56 but in fact by the President's own past actions.[27] Since the inception of the UCMJ

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[27] I recognize that the Court of Military Appeals in *United States v. Flucas*, 23 U.S.C.M.A. 274, 275, 49 C.M.R. 449, 450 (1975), held that the President acted with proper authority when, pursuant to Article 36, UCMJ, he established the "element" of knowledge for the offense of assault, he provided "an aggravating factor increasing the maximum permissible punishment 'when the victim has a particular status or is performing a special function.' Paragraph 207b, MCM 1969." I can, however, distinguish *Flucas* on one simple ground—the death penalty is so unique that it requires different treatment. As Justice Stewart stated in his concurring opinion in *Furman*, 408 U.S. at 306, 92 S.Ct. at 2760, 33 L.Ed.2d at 388:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

See Dix, "Appellate Review of the Decision to Impose Death," 68 Geo.L.J. 97, 109 (1979).

Additionally, the punishment statute—Article 56—is clear on its face

and the promulgation of the first Manual for Courts-Martial, the provisions relating to the maximum punishments authorized for particular offenses—the Table of Maximum Punishments in MCM 1951 and 1969—have never addressed the punishments authorized for those offenses described in the various articles that authorize the imposition of the death penalty, even where life imprisonment is a mandatory lesser sentence. Therefore, since offenses carrying the death penalty are capital offenses, the President does not have the authority to prescribe anything which might effect the maximums with regard to Article 118, most particularly the aggravating factors that determine whether one convicted of a capital offense is eligible for consideration of imposition of the death penalty. If the President could prescribe the aggravating factors which make a person eligible for imposition of the death penalty, he would place a maximum on all other situations wherein a death occurs as the result of a criminal act for which Congress has authorized the death penalty. He would thus act contrary to congressional intent and his authority under Article 56. *See Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 1733, 77 L.Ed.2d 235 (1988); *United States v. United Verde*, 196 U.S. at 207, 25 S.Ct. at 222; *United States v. McCormick*, 12 U.S.C.M.A. 26, 30 C.M.R. 26 (1960). While it is true that such an action accrues to the benefit of some capital offenders, without the proper authority or specific guidance of Congress, the President not only usurps authority but places other capital offenders in jeopardy when Congress may not have intended such unequal classification.[28]

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and it does not pertain to the death penalty. Thus, the principles of strict statutory construction apply. *United States v. Jenkins*, 7 U.S.C.M.A. 261, 262, 22 C.M.R. 51, 52 (1956).

[28] I also make no judgment on equal protection of the law questions such as that posed by appellant. I find it unnecessary to my resolution of this case.

A further indication that Congress and not the President is the proper authority for prescribing the aggravating factors, and a recognition by Congress of its responsibilities in this arena, is the 1986 enactment of Article 106a, 10 U.S.C. § 906a. Not only did Congress establish espionage as a capital offense, it also set forth within the statute itself, the aggravating factors that had to be found before imposition of the death penalty could be adjudged.[29] In that statute the Congress further delegated to the President the authority to prescribe other aggravating factors under Article 86.[30]

VI.

SUMMARY

In summary, I find that the Article 118 provision authorizing the imposition of the death penalty is unconstitutional and therefore invalid because of *Furman* and its progeny. I further find that the President's attempt in 1984 to effectuate that invalid authorization by promulgation of the aggravating factors set forth in R.C.M. 1004(c) pursuant to the authority vested in him by Articles 36 and 57, as they presently exist, was ineffectual because such delegation was constitutionally impermissible in the first place, or was an improper delegation by the Congress in the second.

Accordingly, while I approve the findings, I would disapprove the death penalty as approved on review below as a matter of law and approve only so much of the sentence as provides for dishonorable discharge, life imprisonment, forfeitures of all pay and allowances and reduction to pay grade E-1.

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[29] If Congress had tacitly approved or ratified R.C.M. 1004, as offered by the majority, why was it necessary for the Congress to set forth specific aggravating factors for Article 106a, UCMJ, a post-*Furman* statute?

[30] The propriety of that additional delegation is a matter for future resolution, if necessary.

APPENDIX F

U.S. COURT OF MILITARY APPEALS

No. 63,044
NMCM 87-3856

UNITED STATES, APPELLEE

v.

RONNIE A. CURTIS, LANCE CORPORAL, U.S. MARINE CORPS, APPELLANT

Argued Aug. 29, 1990
Decided April 18, 1991

Accused, a lance corporal in the United States Marine Corps, was convicted by general court-martial, Sebastian Gaeta, Jr., J., of premeditated murder of two victims, burglary of their home, and various other offenses, and was sentenced to death. The United States Navy-Marine Corps Court of Military Review, 28 M.J. 1074, affirmed. On mandatory review the United States Court of Military Appeals, Everett, Senior Judge, held that: (1) capital case procedure promulgated by President through rule was not invalid as impermissible extension of presidential power and did not violate separation of powers, although President prescribed aggravating factors to be considered in making death penalty determination through the Manual for Courts-Martial; (2) rule promulgated by President to provide procedure for capital cases was not facially unconstitutional; and (3) before death sentence adjudged by court-martial can be approved, Court of Military Review must determine: whether one or more valid aggravating factors have been unanimously found by court-martial and that finding is factually and legally correct; if any corrective action results in setting aside any such finding, but leaves intact at least one aggravating factor, whether that error affected imposition of sentence; whether death sentence adjudged is disproportionate to other death sentences that have been imposed; and whether under all facts and circumstances of case death sentence is appropriate.

SULLIVAN, C.J., and COX, J., filed concurring statements.

For Appellant: *Robert E. Morin* and *Lieutenant Commander John B. Holt*, JAGC, USN (argued); *Captain Arthur R. Philpott*, JAGC, USN, *Lieutenant Commander L. Saccoccio*, JAGC, USNR-R; *Lieutenant Commander Susan K. Milliken*, JAGC, USN, *Captain Dwight H. Sullivan*, USMCR, *Lieutenant Frederic D. Firestone*, JAGC, USNR, *Lieutenant Thomas E. Miro*, JAGC, USNR (on briefs).

For Appellee: *Major Thomas D. Miller*, USMC, and *Lieutenant Commander Lawrence W. Muschamp*, JAGC, USN (argued); *Commander Thomas W. Osborne*, JAGC, USN and *Lieutenant Colonel Joseph S. Uberman*, USMC (on briefs); *Lieutenant Scott A. Hagen*, JAGC, USNR.

Amici Curiae on behalf of Appellant: *Captain Richard W. Aldrich*, (argued)—For Appellate Defense Division, USAF. *Ronald Meister* (argued); *Edward H. Shakin* (on brief)—For American Civil Liberties Union Foundation. *Captain Michael J. Berrigan* (argued); *Colonel Robert B. Kirby, Lieutenant Colonel Russell S. Estey, Captain Cynthia G. Wright* (on brief)—For Defense Appellate Division, U.S. Army. *Roger L. Stavis, Esq.* (argued); *Stephen J. Shapiro* and *Nicholas Kamillatos* (on brief)—For the Association of the Bar of the City of New York Committee on Military Affairs and Justice. *Jeanelle Mosley* (law student) (argued); *Ronald F. Wright* (on brief); *Michelle Davis*,

Gaylyn Gee, Anne Shaw (law students)—For Wake Forest University School of Law Clinical Appellate Program. *Steven H. Goldblatt* (on brief); *Kevin M. Hodges, Brian G. Holland, Juan Enrique Mejia* (law students)—For Georgetown University Law Center Appellate Litigation Program.

Amici Curiae on behalf of Appellee: *Captain David G. Nix* (argued), *Colonel Joe R. Lamport* and *Colonel Robert E. Giovagnoni* (on brief), *Major Paul H. Blackwell, Jr.*—For Appellate Government Division, USAF. *Captain Jonathan F. Potter* (argued); *Colonel Alfred F. Arquilla, Lieutenant Colonel Daniel J. Dell'Orto, Captain Randy V. Cargill, Captain Stephen R. Henley* (on briefs), For Government Appellate Division, U.S. Army *Paul J. Larkin, Jr.* (argued); *William P. Barr* and *Edward S.G. Dennis, Jr.*, Assistant Attorneys General; *Andrew G. McBride*, Associate Deputy Attorney General (on briefs)—For U.S. Department of Justice. *Paul D. Kamenar* (argued); *Daniel J. Popeo* (on brief)—For Washington Legal Foundation.

OPINION OF THE COURT

EVERETT, Senior Judge:

Appellant was sentenced to death by a general court-martial convened at Camp Lejeune, North Carolina. The issues now before us are whether the President was empowered to prescribe the procedure under which this sentence was adjudged and, if so, whether the rule he prescribed complied with constitutional requirements.

I

On April 14, 1987, Curtis used a pretext to obtain entry to the home of his supervisor, First Lieutenant James Lotz. His purpose—apparently the result of perceived racial slurs and the imbibing of gin—was to kill Lotz. He carried out his objective with a knife, and then he killed Lotz' wife, Joan.

After being apprehended, appellant was charged with the premeditated murder of both victims, the burglary of their home, and various other offenses.[1] The convening authority referred the charges to trial as a capital case; and pursuant to RCM 1004, Manual for Courts-Martial, United States, 1984, the Government notified[2] the defense of the "aggravating factors" on which it would rely.

After the general court-martial found Curtis guilty as charged, the Government offered evidence as to these "aggravating factors": (1) that Lieutenant Lotz' murder was aggravated by the murder of his wife; (2) that Mrs. Lotz' murder was aggravated by the murder of Lieutenant Lotz; and (3) that Mrs. Lotz' murder occurred during a burglary,[3] to wit: breaking and entering into the Lotz home at night with the intent to commit murder. The general court-martial adjudged the death sentence, which the convening authority approved. Thereafter, the Court of Mili-

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[1] These offenses included larceny of the knife he used to kill the Lotzes; larceny of their automobiles; and indecent assault on Mrs. Lotz after he had stabbed her. These offenses were in violation of Articles 118, 129, 121, and 134, Uniform Code of Military Justice, 10 USC §§ 918, 929, 921, and 934, respectively.

[2] At trial the defense questioned the validity of the notice because it only listed two "aggravating circumstances," namely: "a. the murder of Joan M. Lotz was committed while the accused was engaged in the commission of a burglary; and b. The accused . . . has been found guilty in the same case of another violation of Article 118." The defense objected to three factors being listed in the instructions and on the sentence worksheet when they were notified of only two. While the judge found the defense was not misled by the notice, it would be advisable for the notice to be precise as to what factors are being relied on for each specification which carries the death penalty.

[3] The Government relied on a "constructive breaking" by means of a pretext. *See* para. 55c(2), Manual for Courts Martial, United States, 1984. Curtis had come to the Lotz home at 2:00 a.m. and had pretended that another Marine had been in an accident. Lieutenant Lotz invited Curtis in while he phoned for assistance. While Lotz was phoning, appellant stabbed him

tary Review reviewed the case *en banc* and unanimously affirmed the findings of guilty. 28 MJ 1074 (1989). However, Chief Judge Byrne dissented from affirmance of the death sentence, which he concluded was not appropriate in this case (*id.* at 1095-96); and Judge Albertson dissented from affirmance of the sentence because she believed that RCM 1004 was unconstitutional. *Id.* at 1096-1113.

The case reached this Court for mandatory review. *See* Art. 67(a)(1), Uniform Code of Military Justice, 10 USC § 867(a)(1) (1989). After considering the briefs submitted by the parties, as well as various motions, we concluded that two issues—which were discussed extensively in the Court of Military Review, raised in this Court, and are common to any capital case tried by a court-martial—should be separately considered and argued. These issues were:

I

WHETHER THE CAPITAL PUNISHMENT PROCESS UNDER WHICH APPELLANT WAS SENTENCED TO DEATH IS INVALID BECAUSE IT IS AN IMPERMISSIBLE EXTENSION OF PRESIDENTIAL POWER.

II

WHETHER RULE FOR COURTS-MARTIAL 1004 IS UNCONSTITUTIONAL ON ITS FACE.

Thereafter, we received supplemental briefs from the parties and from various amici curiae and then heard extensive oral argument. Aided by the excellent briefs and argument, we now have concluded that the President acted within his powers in promulgating RCM 1004 and that this Rule otherwise satisfies constitutional requirements.

II

A

The Constitution, on its face, does not single out capital cases for special treatment. This point was made in *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)—overruling *Betts v. Brady,* 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), which had drawn a distinction between capital and noncapital cases. Likewise, in *Kinsella v. United States ex rel. Singleton,* 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960), the Supreme Court rejected the attempt by Justices Frankfurter and Harlan to draw a line between capital and noncapital cases with respect to military jurisdiction over civilian defendants abroad.

The Supreme Court, however, has now made clear that the Eighth Amendment requires a different treatment of death-penalty cases. Thus, in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), a majority of the justices agreed that the arbitrary and capricious imposition of capital punishment—which, in their view, characterized most state procedures—violated the Eighth Amendment. *Cf. Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Likewise, in applying double jeopardy protections, a capital case is treated differently from other cases. *Cf. Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981).

We observe, also, that in practice, the issues raised by capital cases occupy a significant amount of the time spent by appellate courts. Thus, in its 1989 term, nine cases decided by the Supreme Court were capital.[4] The collateral attacks and multiple

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[4] *Blystone v. Pennsylvania,* 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255; *Boyde v. California,* 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316; *Butler v. McKeller,* 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed.2d 347; *McKoy v. North Carolina,* 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369; *Saffle v. Parks,* 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415; *Clemons v. Mississippi,* 494

reviews in capital cases have posed problems of judicial administration which have troubled Congress, the Supreme Court, the legal profession, and the public.

In regulating military justice, Congress has exhibited a special concern for capital cases. Most of the punitive articles of the Uniform Code of Military Justice provide that a convicted person "shall be punished as a court-martial may direct"; and only for a few crimes—such as wartime desertion, mutiny, sedition, espionage, murder, and rape—is a court-martial empowered to impose "death or such other punishment as a court-martial may direct." *See, e.g.*, Arts. 85(c), 94(b), 106a(a)(1), 118, and 120(a), UCMJ, 10 USC §§ 885(c), 894(b) 906a(a)(1), 918, and 920(a), respectively.[5] Article 45(b) of the Uniform Code, 10 USC § 845(b), prohibits a guilty plea in a capital case. Article 49(f), UCMJ, 10 USC § 849(f), limits use of depositions in capital cases. The third clause of Article 134, UCMJ, 10 USC § 934, incorporates the federal criminal code into military justice, but it only does so with respect to "crimes and offenses not capital."

B

In *United States v. Matthews*, 16 MJ 354 (CMA 1983), this Court considered the constitutionality of the sentencing procedure then prescribed for capital cases by the Manual for Courts-Martial. In some respects, this procedure met the requirements which we held had been established by *Furman v. Georgia, supra*, and succeeding Supreme Court cases—requirements which we concluded were applicable to courts-martial. For example, trials by courts-martial are bifurcated—the sentencing proceedings being separate from the adjudication of guilt. The accused has unlimited opportunity to present mitigating and extenuating evidence, which the military judge must identify to the court members for their deliberations on sentence. Moreover, mandatory review of the facts, the law, and the appropriateness of sentence is provided in death cases—as well as in most other cases tried by general court-martial.

U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725; *Whitmore v. Arkansas*, — U.S. —, 110 S.Ct. 1717, 109 L.Ed.2d 135; *Walton v. Arizona*, — U.S. —, 110 S.Ct. 3047, 111 L.Ed.2d 511; *Lewis v. Jeffers*, — U.S. —, 110 S.Ct. 3092, 111 L.Ed.2d 606.

[5] For premeditated murder or felony murder, the punishment imposable under Article 118 is "death or imprisonment for life."

The principal defect that *Matthews* identified in the military justice system was that neither the Uniform Code of Military Justice nor the Manual for Courts-Martial required the court-martial members to "specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty." 16 MJ at 379. Thus, upon appellate review, it was impossible to assure that a death penalty adjudged by a court-martial reflected "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Ibid.* quoting *Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235 (1983).

In *Matthews*, we ruled that either Congress or the President could "take [corrective] action to remedy" the "defect that now exists in the sentencing procedure employed by courts-martial in capital cases." 16 MJ at 380. The majority of this Court concluded that, if new sentencing procedures were authorized, they could be applied retroactively for resentencing Matthews or other servicemembers as to whom death sentences had been adjudged. *Cf. Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). Indeed, we ruled in *Matthews* that if the President or Congress prescribed constitutionally valid procedures for imposing the death penalty within 90 days after we issued our mandate, the new procedures could be used in resentencing the accused. 16 MJ at 382.

Within the 90-day period that had been allowed by this Court, President Reagan amended the Manual for Courts-Martial to provide a new procedure for capital cases. Exec. Order No. 12,460,

49 Fed.Reg. 3169 (1984). However, this amendment, by its own terms (§ 6), was prospective in application and was not intended to apply to Mathews or any other servicemember whose case had already been tried.

The death penalty procedure authorized by the President in January 1984 became RCM 1004 in the Manual for Courts-Martial, United States, 1984. When Congress amended the Uniform Code in 1985 by adding Article 106a—Espionage, and authorized the death penalty for this crime, RCM 1004 was amended to specify some additional "aggravating factors" for members of a court-martial to consider in deciding on a death penalty. § 1k(4), Exec. Order No. 12,550, 51 Fed.Reg. 6497, 6498 (1986).

We are now asked by appellant to reconsider our conclusion in *Matthews* that the President may constitutionally define the circumstances under which a death penalty may be imposed by a court-martial. Furthermore, appellant maintains that, in its present form, RCM 1004 is unconstitutional on its face.

III

A

RCM 1004, which is captioned "Capital cases," currently provides:

> (a) *In general.* Death may be adjudged only when:
>
> (1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and
>
> (2) The accused was convicted of such an offense by the concurrence of all the members of the court-martial present at the time the vote was taken; and
>
> (3) The requirements of subsections (b) and (c) of this rule have been met.

> (b) *Procedure.* In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases—
>
> (1) *Notice.* Before arraignment, trial counsel shall give the defense written notice of which aggravating factors under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating factors under subsection (c) of this rule shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.
>
> (2) *Evidence of aggravating factors.* Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating factors in subsection (c) of this rule.
>
> (3) *Evidence in extenuation and mitigation.* The accused shall be given broad latitude to present evidence in extenuation and mitigation.
>
> (4) *Necessary findings.* Death may not be adjudged unless—
>
> (A) The members find that at least one of the aggravating factors under subsection (c) existed;
>
> (B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and;
>
> (C) All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule.
>
> (5) *Basis for findings.* The findings in subsection

(b)(4) of this rule may be based on evidence introduced before or after findings under R.C.M. 921, or both.

(6) *Instructions.* In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members of such aggravating factors under subsection (c) of this rule as may be in issue in the case, and on the requirements and procedures under subsections (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge death.

(7) *Voting.* In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

(8) *Announcement.* If death is adjudged, the president shall, in addition to complying with R.C.M. 1007, announce which aggravating factors under subsection (c) of this rule were found by the members.

(c) *Aggravating factors.* Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) That the offense was committed before or in the presence of the enemy, except that this factor shall not apply in the case of violation of Article 118 or 120;

(2) That in commiting the offense the accused—

(A) Knowingly created a grave risk of substantial damage to the national security of the United States; or

(B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;

(3) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this factor shall not apply in case of a violation of Article 118 or 120;

(4) That the offense was committed in such a way or under circumstances that the lives of persons other than the victim, if any, were unlawfully and substantially endangered, except that this factor shall not apply to a violation of Articles 104, 106a, or 120;

(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118 or 120, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

(7) That, only in the case of a violation of Article 118(1):

(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) the murder was committed while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sod-

omy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense;

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

(F) The victim was the President of the United States, the President-elect, the Vice President, or if there was no Vice President, the officer in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress (including a Delegate to, or Resident Commissioner in, the Congress) or Member-of-Congress elect, justice or judge of the United States, a chief of state or head of government (or the political equivalent) of a foreign nation, or a foreign official (as such term is defined in section 1116(b)(3)(A) of title 18, United States Code), if the official was on official business at the time of the offense and was in the United States or in a place described in Mil.R.Evid. 315(c)(2), 315(c)(3);

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United

States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;

(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim;

(J) The accused has been found guilty in the same case of another violation of Article 118;

(8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing;

(9) That, only in the case of a violation of Article 120:

(A) The victim was under the age of 12; or

(B) The accused maimed or attempted to kill the victim;

(10) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offense;

(11) That, only in the case of a violation of Article 104 or 106a:

(A) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute; or

(B) That in committing the offense, the accused knowingly created a grave risk of death to a person other than the individual who was the victim.

For purposes of this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense

advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without.

(d) *Spying.* If the accused has been found guilty of spying under Article 106, subsections (a)(2)(b), and (c) of this rule and R.C.M. 1006 and 1007 shall not apply. Sentencing proceedings in accordance with R.C.M. 1001 shall be conducted, but the military judge shall announce that by operation of law a sentence of death has been adjudged.

(e) *Other penalties.* Except for a violation of Article 106, when death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, and may be adjudged in lieu of the death penalty, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal, as appropriate. Confinement is a necessary incident of a sentence of death but not a part of it.

(Discussion omitted.)

B

If "aggravating factors" used in channeling the discretion of the sentencing authority in death cases were elements of the crime, we would have no choice but to hold that they must be set forth by Congress and cannot be prescribed by the President. Consistent with Article I of the Constitution, only Congress has the power to legislate; and definition of the elements of a crime clearly is legislation. However, the Supreme Court has made clear that "aggravating factors" are not "elements" of a crime. *Cf. Walton v. Arizona*, 497 U.S. —, — 110 S.Ct. 3047, 3054-55, 111 L.Ed.2d 511, 525 (1990). For this reason a defendant has no right to a

jury trial as to the existence of aggravating factors, and the sentencer's rejection of a particular circumstance is not an "acquittal" of that circumstance for double jeopardy purposes. Cf. *Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986).

Is it consistent, then, with the separation of powers required by the Constitution for the President to prescribe these "aggravating factors"? The recent decision of the United States Supreme Court in *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), provides us with guidance.

There the Court considered the constitutionality of sentencing guidelines issued by the Sentencing Commission, which is chaired by a Federal circuit judge and has other judges among its members. The defendant complained that the commission and its guidelines were unconstitutional because promulgation of guidelines was a legislative task which should have been performed by Congress and because "the separation of powers doctrine" was violated by allowing active members of the judiciary to serve on the commission. However, the Supreme Court concluded, over Justice Scalia's vigorous dissent, that establishment of the commission had not violated separation-of-powers requirements and that the guidelines had been constitutionally promulgated.[6]

In *Mistretta*, the Court seemed willing to allow considerable flexibility and innovativeness in the allocation of power among governmental institutions. Apparently its chief concern was that one branch of Government not aggrandize itself at the expense of another. However, in *Mistretta* this fear was allayed because Congress had established the Sentencing Commission and had defined the task which it wished the Commission to perform. A year before the Court took a similar tack in upholding legislation

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[6] In footnote 11 of its opinion in *Mistretta*, the Supreme Court discussed the Sentencing Commission's authority with respect to the death penalty. 488 U.S. 361, 378, 109 S.Ct. 647, 657-58, 102 L.Ed.2d 714 (1989).

which provided for an Independent Counsel. *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

Unlike an Independent Counsel or members of the Sentencing Commission, the President holds an office specifically authorized by the Constitution. Moreover, he has been invested by the Constitution with the "executive Power," Art. II, § 1, and is the Commander-in-Chief of the Armed Forces. Art II, § 2. In view of his inherent constitutional authority, a separation-of-powers objection has much less merit in the present context than if the "aggravating factors" for capital cases tried by courts-martial had been formulated by a specially created commission.

We are mindful, however, of the separation-of-powers analysis in Justice Jackson's often cited concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). There, in dealing with the seizure of steel mills during the Korean War, Justice Jackson suggested that the President's power is the greatest when he acts under a specific delegation from Congress; is less when he acs without delegation, but as to a subject concerning which Congress has not legislated; and is the least when he acts on the basis of his inherent constitutional authority and against the express or implied wishes of Congress. *See* 343 U.S. at 635-38, 72 S.Ct. at 870-72. Presidential power to prescribe the "aggravating factors" in RCM 1004 is more sustainable if it has been expressly or implicitly conferred by Congress, or if Congress, at least, has displayed no desire to legislate in this field and a willingness to let the President take action.

It is clear that Congress has been willing for the President to play the major role in determining what punishments may be imposed by courts-martial. Most of the punitive articles in the Uniform Code provide that a convicted accused "shall be punished as a court-martial may direct." Under Article 56, UCMJ, 10 USC § 856, "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President

may prescribe for that offense." Article 18, UCMJ 10 USC § 818, states that a general court-martial "may, *under such limitations as the President may prescribe*, adjudge any punishment not forbidden by [the Code], including the penalty of death when specifically authorized by" the Code. (Emphasis added.) When these Articles are taken together, they reveal that—instead of legislating maximum punishments as it has done in Title 18 of the United States Code for cases tried in the District Courts—Congress has decided that the President shall set the maximum punishment imposable in trials by courts-martial.

Consistent with Articles 18 and 56 of the Code—and previously with comparable provisions of the Articles of War—the President for several decades prescribed maximum punishments in a Table of Maximum Punishments as part of the Manual for Courts-Martial. The current Manual sets the maximum punishments in subparagraph e for each paragraph in Part IV devoted to a particular offense.[7] In some instances, this Table and now the Manual text provide that a maximum punishment is increased because of aggravating circumstances. For example, driving while drunk carries a heavier penalty if it results in death. Para. 35e(1), Part IV, 1984 Manual, *supra*. Desertion terminated by apprehension authorizes a higher maximum punishment than desertion terminated by surrender. Para. 9e(2). The maximum punishment for larceny depends on the value of the property stolen. Para. 46e(1). And so on.

Thus, under a power delegated by Congress, the President has for many years been prescribing aggravating circumstances that would increase the punishment imposable for various offenses tried by courts-martial. Presumably, Congress has been well aware of his exercise of this power because, under Article 36(b) of the Uniform Code, 10 USC § 836(b), the rules and regulations pre-

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[7] Appendix 12 of the Manual lists maximum punishments, but it is not authoritative.

scribed by the President for courts-martial—including, of course, the maximum punishments—must be reported to Congress.

Since 1951 death penalties have been authorized by several punitive articles of the Uniform Code, and previously they had been permitted by the Articles of War and the Articles for the Government of the Navy. Furthermore, Congress has never displayed any intent to rescind them.

In 1983, when this Court decided *Matthews,* we held that either Congress or the President could prescribe "aggravating factors" for death cases in courts-martial. 16 MJ at 380-81. In view of our analysis in *Matthews,* it should have been apparent that, unless these aggravating factors were prescribed by one branch of government or the other, courts-martial would be precluded from adjudging death penalties.

When, after our *Matthews* decision the President prescribed a new sentencing procedure for death cases, his action was promulgated by Executive Order No. 12,460, *supra,* which gave notice to Congress and the public at large. We are unaware of any indication of legislative displeasure with the President's action or any legislative effort at that time to undo his action or to curtail the use of capital punishment in courts-martial.

In 1985, Congress enacted legislation which we interpret to be an affirmation of presidential power to prescribe "aggravating factors" for capital cases. The Uniform Code was amended by the addition of Article 106a, which prohibited espionage and authorized punishment "by death or such other punishment as a court-martial may direct." Art. 106a(a)(1). In connection with its death penalty, Article 106a provided:

> (b)(1) No person may be sentenced by court-martial to suffer death for an offense under this section (article) unless—
>
> (A) the members of the court-martial unanimously find at least one of the aggravating factors set out in subsection (c); and

> (B) the members unanimously determine that any extenuating or mitigating circumstances are substantially ouweighed by any aggravating circumstances, including the aggravating factors set out in subsection (c).
>
> (2) Findings under this subsection may be based on—
>
> (A) evidence introduced on the issue of guilt or innocence;
>
> (B) evidence introduced during the sentencing proceedings; or
>
> (C) all such evidence.
>
> (3) The accused shall be given broad latitude to present matters in extenuation and mitigation.
>
> (c) A sentence of death may be adjudged by a court-martial for an offense under this section (article) only if the members unanimously find, beyond a reasonable doubt, one or more of the following aggravating factors:
>
> (1) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute.
>
> (2) In the commission of the offense, the accused knowingly created a grave risk of substantial damage to the national security.
>
> (3) In the commission of the offense, the accused knowingly created a grave risk of death to another person.
>
> (4) *Any other factor that may be prescribed by the President by regulations under section 836 of this title (article 36).*

Pub.L. No. 99-145, title V, § 534(a), 99 Stat. 634 (1985) (emphasis addded).

Two features of this legislation are noteworthy. First, the procedure prescribed by Article 106a conforms generally to the procedure which the President previously had prescribed in RCM 1004. Secondly, the President is specifically authorized by Article 106a(c)(4) to prescribe other "aggravating factors" in addition to the three that are set forth in Article 106a(c)(1)-(3). This authority is linked in (c)(4) of that Article to the power granted him by Article 36(a) of the Uniform Code to prescribe "[p]retrial, trial, and post-trial procedures, including modes of proof," for trials by courts-martial.[8]

In connection with the provision for death-penalty sentence proceedings in Article 106a, H.R. Conference Report No. 235, 99th Cong., 1st Sess., states:

> The conferees did, however, adopt a statutory formulation of capital sentencing standards for espionage cases and intend that those standards be implemented in a manner consistent with the provision of Rule for Courts-Martial 1004 of the Manual for Courts-Martial, 1984. The conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards *that already exist for the other capital punishment articles.*

DOD Authorization Act of 1986, Pub.L. No. 99-145, 1985 U.S. Code Cong. & Admin. News, 571, 579 (emphasis added). If failure of Congress to complain about the content of regulations can be construed to be ratification, *cf. Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers, AFL-CIO,* 367 U.S. 396, 408-09, 81 S.Ct. 1529, 1535-36, 6 L.Ed.2d 924 (1961), the provisions of Article 106a—

[8] Under Article 36(b), UCMJ, 10 USC § 836(b), the rules and regulations promulgated under Article 36(a) "shall be reported to Congress."

along with its legislative history—are even clearer evidence of ratification.

As heretofore mentioned, the Supreme Court has made clear its concern that one branch of government not grab any power which the Constitution has conferred on another branch. *Cf. Mistretta* and *Morrison,* both *supra; Bowsher v. Synar,* 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986). By implication Article 106a affirms that Congress does not consider the President's prescribing "aggravating factors" to be in diminution of its own legislative power. Instead, Congress undoubtedly has concluded that, in view of the major role that for decades it has delegated to the President in prescribing limitations on maximum punishment, it is better for the President to prescribe "aggravating factors" by Executive Order than for Congress to attempt to do so by statute.[9]

C

To the extent we rely on delegation from Congress as a source of presidential power, we are confronted by appellant's argument that Congress failed to prescribe standards for the exercise of the delegated power. *Cf. A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935); *Panama Refining Co. v. Ryan,* 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935). Certainly Congress did not give the President guidance as explicit as that which the Sentencing Reform Act prescribed for the Sentencing Comission. Indeed, Justice Scalia, the sole dissenter in *Mistretta,* perceived no delegation problem

[9] Since we conclude that Congress has—at least, implicitly—delegated this task to the President, we need not consider what inherent authority the President would have in this area. For example, absent any indication of congressional willingness for him to prescribe "aggravating factors," could the President constitutionally do so? Also, what if Congress attempted to block exercise of this power by the President?

in the creation of that Commision and was concerned chiefly with the claimed violation of separation-of-powers principles.

However, in prescribing "aggravating factors" the President was not left totally without guidance from Congress. Article 106a(c)(4) refers to regulations prescribed by the President under Article 36—which, in turn, directs that the President "shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be conrary to or inconsistent with" the Uniform Code. *See* Art. 36(a). Apparently Congress wished the President to look to the "principles of law" applied in federal criminal cases in determining what should be the "aggravating factors" for capital cases tried by court-martial. Furthermore, as we examine the "aggravating factors" prescribed by the President in RCM 1004, we find that they reflect policy expressed by Congress in various statutes—including several punitive articles of the Uniform Code of Miliary Justice—and also conform generally with the Model Penal Code and with policies expressed in the statutes of many of the 36 states which authorize the death penalty.[10]

"Aggravating factor" (1) is commission of the offense "before or in the presence of the enemy." Article 99 of the Code, 10 USC § 899, authorizes death for nine types of misbehavior "before or in the presence of the enemy" and thereby it reflects a legislative judgment that such conduct is very harmful to the military mission.

"Aggravating factor" (2)(A) corresponds to an "aggravating factor" prescribed by Congress for espionage offenses, *see* Art. 106a(c)(2); and "Aggravating factors" (2)(B) and (3) also correlate wth the manifest congressional concern about espionage—a crime

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[10] *See Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 2975, n.2, 2978 no.5, 106 L.Ed.2d 306 (1989), for a collection of federal and state statutes concerning the death penalty.

for which death is authorized by Article 106a(a)(1) of the Code. *See also* 18 USC § 794.

"Aggravating factor" (4) parallels an "aggravating factor" prescribed by Article 106a(c)(3) and reflects special concern if the crime for which the accused has been convicted created a grave risk of death to others. This "aggravating factor" has parallels in many state statutes authorizing the death penalty.[11]

"Aggravating factor" (5)—which involves commission of the offense "with the intent to avoid hazardous duty"—reflects legislative disapproval of flight from hazardous duty. Thus, desertion with intent to avoid hazardous duty authorizes the death penalty in time of war, *see* Art. 85(a)(2) and (c); and running away from the enemy or cowardly conduct also permits a death penalty, *see* Art. 99(1) or (5).

"Aggravating factor" (6)—which applies to murders and rapes in time of war—deals with conduct which violates the law of war; and thereby threatens international relations. The death penalty is not unusual for violations of the law of war; *see, e.g., In re Yamashita*, 327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946)[12]; *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed.3 (1942); and perhaps the constitutional restrictions derived from *Furman* may not even apply to such violattions. *Cf. Yamashita* and *Quirin*.

"Aggravating factor" (7)—applies only to premeditated murder in violation of Article 118(1) and is the only "aggravating factor" involved in appellant's case. This "aggravating factor" has ten subparts. As explained in the Drafters' Analysis of this rule, *see*

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[11] *Commonwealth v. Smith*, 518 Pa. 15, 540 A.2d 246 260 (1988); *Jones v. State*, 520 So.2d 543, 551-52 (Ala. 1988); *Stouffer v. State*, 738 P.2d 1349, 1361 (Okl.Cr. 1987); *Hogan v. State*, 103 Nev. 21, 732 P.2d 422, 424 (1987); *Way v. State*, 496 So.2d 126, 128 (Fla. 1986).

[12] Article 106, UCMJ, 10 USC § 906, which is based on the law of war, applies not only to servicemembers but also to civilians. Whether its mandatory death penalty is constitutional is open to question. *Cf. Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

Manual for Courts-Martial, United States, 1984, at A21-66 (Change 2), these "aggravating factors" were to a considerable extent derived from those contained in the state statutes enacted in response to *Furman v. Georgia, supra.*

Factor (7)(A) applies to an accused "serving a sentence of confinement for 30 years or more or for life at the time of the murder." This factor is intended to express disapproval of premeditated murder by an accused who has already been convicted of a very serious crime. Also, it may provide an additional deterrent for someone who might only be deterred by the death penalty.

Factor (7)(B) is that the premeditated murder occured "while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense."

Congress has severely condemned all of these crimes. Under Article 118(4), murder committed in the course of "burglary, sodomy, rape, robbery, or aggravated arson" permits a death sentence and requires at least life imprisonment. Mutiny and sedition are themselves capital offenses under Article 94. Piracy long has been viewed as a universal offense against the law of nations and is specifically mentioned in Article I, § 8, cl. 10 of the Constitution. Congress has prescribed the death penalty for skyjacking under certain circumstances—49 USC App § 1472(i)(l)(B) (aircraft piracy resulting in death authorizes the death penalty).[13] Kidnapping also is severely condemned by the Federal criminal code, 18 USC § 1201(a)—although the death penalty, which at one time Congress authorized for this crime,

[13] Whether the authorized penalty of death if the death of another person occurs as a result of the air piracy is constitutionally sustainable may be questioned since the statute requires no specific findings of aggravation and specifies no aggravating factors.

was subsequently held unconstitutional in *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968).

Factors (7)(C), (7)(D), and (7)(E)—which involve, respectively, murder "for the purpose of receiving" something of value, "procur[ing] another . . . to commit the murder," or committing the murder "to avoid or to prevent lawful apprehension or effect an escape"—have counterparts in many state statutes. *See, e.g., Ariz. Rev. Stat. Ann.* 13-703(F)(5) (Supp. 1988) (which includes as a factor that the homicide was committed with the expectation of receiving something of value); *see also Walton v. Arizona*, — U.S. —, 110 S.Ct. 3047, 3051, 111 L.Ed.2d 511 (1990). Of course, resistance of apprehension and escape are offenses under the Uniform Code. *See* Art. 95, 10 USC § 895.

"Aggravating factor" (7)(F)—concerns the official status or duties of the victim, and it corresponds with recent legislation seeking to protect various public officials. *See, e.g.* 18 USC §§ 351 and 1751.

Factor (7)(G) centers on the victim's execution of his military office or his duties, military or civilian, in law enforcement, security, or firefighting. At least to some extent, this "aggravating factor" recognizes a congressional intent to protect persons performing duties important to public safety. *Cf.* 18 USC § 1114; Arts. 90 and 91, UCMJ, 10 USC §§ 890 and 891, respectively.

"Aggravating factor" (7)(H) concerns "intent to obstruct justice." Obstruction of justice is a recognized federal crime. 18 USC §§ 1501-15. In military practice obstruction or interference with the administration of justice is not limited to those acts enumerated in the federal criminal code—*United States v. Jones*, 20 MJ 38, 40 (CMA 1985); *United States v. Long*, 2 USCMA 60, 6 CMR 60 (1952); but under the facts here we need not decide which definition should be applied to the act alleged to have aggravated the offense.

"Aggravating factor" (7)(I) resembles an "aggravating factor" in many state statutes for murders described as "heinous, atrocious, or cruel" or in similar terms. However, unlike the state statutes—which have sometimes been successfully attacked as vague—*see Maynard*

v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and have required limiting judicial construction, *cf. Walton v. Arizona*, *supra*—this "aggravating factor" is stated clearly in RCM 1004.

"Aggravating factor" (7)(J) is "another violation of Article 118"—*i.e.*, another murder—"in the same case." Since any violation of Article 118 has a maximum punishment either of death or of life imprisonment this "aggravating factor" is predicated on conduct viewed quite seriously by Congress. Likewise, in many state statutes, a second murder is an "aggravating factor."[14]

"Aggravating factor" (8) applies only in the case of a violation of Article 118(4), and so relates only to felony murders. We have held that an accused may be convicted of murder under Article 118(4) even though he did not kill the victim and only aided and abetted commission of the felony on which the felony-murder conviction was based. *United States v. Jefferson*, 22 MJ 315 (CMA 1986). The Supreme Court has concluded that the Eighth Amendment is violated when a defendant is sentenced to death for a felony murder if he did not participate actively in the killing. *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *but cf. Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (upholding a death penalty foor an accused who did not kill the victim, but whose conduct was related to the killing).

"Aggravating factor" (9) applies only to a violation of Article 120—which authorizes a death penalty for rape. In *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), the Supreme Court held that executing a defendant for rape of an adult female would violate the Eighth Amendment. We intimated

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[14] *See Townsend v. State*, 533 N.Ed.2d 1215, 1229 (Ind. 1989); *Wallace v. State*, 486 N.Ed.2d 445, 463 (Ind. 1985); *Hightower v. State*, 259 Ga. 770, 386 S.Ed.2d 509, 511 (1989); *State v. Sloan*, 756 S.W.2d 503, 509, 511 (Mo. banc 1988).

in *Matthews* that this same principle would apply to trials by courts-martial, "at least, where there is no purpose unique to the military mission that would be served by allowing the death penalty for this offense." 16 MJ at 380.

This "factor" seeks to comply with *Coker* by permiting the death penaly only if "[t]he victim was under the age of 12" or if "[t]he accused maimed or attempted to kill the victim." Congress has manifested its intent that young females be protected from sexual intercourse by creating the offense of carnal knowledge, whereunder a servicemember may be punished for consensual intercourse with a female under 16. Also, Congress has prohibited both maiming, *see* Art. 124, UCMJ, 10 USC § 924, and attempted murder, *see* Art. 80, UCMJ, 10 USC § 880, and Art. 118.

"Aggravating factor" (10) applies to conduct for which "death is authorized under the law of war." The law of war—which is part of the "Law of Nations" within the meaning of Article I, § 8, cl. 10 of the Constitution—provides a separate basis of military jurisdiction from that which exists under Article I, § 8, cl. 14, on which the Uniform Code is based. *In re Yamashita* and *Ex Parte Quirin*, both *supra*. Violations of the law of war may be tried by general court-martial, *see* Art. 18, or by a military commission or some other type of military tribunal. *Cf.* Arts. 104 and 106, UCMJ 10 USC § 904 and 906, respectively; *In re Yamashita* and *Ex Parte Qirin*, both *supra; Madsden v. Kinsella*, 343 U.S. 341, 72 S.Ct. 699, 96 L.Ed. 988 (1952). If the line of decisions beginning with *Furman v. Georgia*, *supra*, applies to violations of the law of war and if an aggravating factor must be established to permit imposition of the death penalty for those violations, it seems appropriate that one "aggravating factor" should be that the law of war recognizes the seriousness of the conduct involved by authorizing the punishment of death.[15]

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[15] Article 18, UCMJ, 10 USC § 818, authorizes either general courts-martial or other military tribunals to administer the law of war.

"Aggravating factor" (11) applies only to violations of Article 104—aiding the enemy—or of Article 106a—espionage. The first alternative is that "[t]he accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute." Here again, aggravation is found in conduct which Congress has condemned by authorizing punishment of death or life imprisonment.

The other alternative is based on the language of Article 106a(c)(3), whereunder an aggravating factor for the offense of espionage is that "the accused knowingly created a grave risk of death to another person."[16]

From our examination of the "aggravating factors" formulated by the President in RCM 1004, it seems clear that, to a considerable extent the President acted in reliance on legislative policy expressed in the Uniform Code of Military Justice and in other federal statutes. This is especially true with respect to "aggravating factor" (7) and its various subparts—which were utilized in adjudging the death penalty in the present case. To the extent the President went outside federal statutes for guidance, he drew upon the Model Penal Code—which has been a source of decisional guidance in military justice, *see, e.g., United States v. Byrd*, 24 MJ 286 (CMA 1987); *United States v. Frederick*, 3 MJ 230 (CMA 1977); *United States v. Thomas*, 13 USCMA 278, 32 CMR 278 (1962)—and upon patterns discerned in state death-penalty legislation.

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[16] Indeed, the language used in the Rule, which adverts to "grave risk of death to a person other than the individual who was the victim," seems to suggest that, in order for this aggravating factor to apply, the accused not only must have been convicted of aiding the enemy or espionage, but also must have killed one person "who was the victim" and placed in great danger someone else. We doubt that this additional restriction was intended. Nevertheless, since, in describing this "aggravating factor," the President did not use the language, "the victim, if any"—as he did for "aggravating factor" (4)—"aggravating factor" (11)(B) must contemplate a "victim" apart from the person placed at risk.

We note also that RCM 1004 is more specific in prescribing aggravating factors than is true of many state statutes. It does not use terms like "heinous," "vile," "atrocious," and "cruel"—which present issues of vagueness and necessitate extensive judicial construction. *See, e.g., Walton v. Arizona, Maynard v. Cartwright,* and *Godfrey v. Georgia,* all *supra.* Thus, the "aggravating factors" under RCM 1004 are easier to apply than some civilian counerparts.

As has already been emphasized, the "aggravating factors" which President Reagan prescribed in January 1984 and which were incorporated in Manual for Courts-Martial, United States, 1984, were known to Congress. In enacting Article 106a in 1985, Congress specifically authorized the President to prescribe "aggravating factors" for espionage prosections in addiiton to those prescribed by Congress. Art. 106a(c)(4). We interpret this express congressional delegation to signify approval of the standards which the President theretofore had employed in prescribing "aggravating factors" for use in capital cases. RCM 1004(c).

Although the guidance provided by Congress to the President was not so specific as that which Congress gave to the Sentencing Commission, *see Mistretta v. United States, supra,* the President was not set adrift in an uncharted sea. Instead, in prescribing "aggravating factors," he was guided by the Uniform Code and other federal legislation and by a pattern of legislative intent discernible in the state statutes. Moreover, Congress not only acquiesced in his performance of this task but also tacitly ratified the "aggravating factors" when it enacted Article 106a of the Uniform Code.

IV

Appellant has vigorously attacked the constitutionality of RCM 1004, as promulgated by the President. He claims that the Rule should require the court-martial to have at least 12 members at all times.[17] Appellant recognizes that courts-martial are not subject to

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[17] In appellant's case, there were originally 15 members of the court-martial, but after challenges, the number was reduced to 9.

the jury-trial requirements of the Sixth Amendment, *see Ex parte Quirin*, 317 U.S. at 39-45, 63 S.Ct. at 16-19; but he reasons that to allow a death penalty to be imposed by less than 12 members violates the Eighth Amendment. His premise is that, even though juries in state courts are not required constitutionally to have 12 members, *see William v. Florida*, 399 U.S. 78, 98 S.Ct. 1893, 26 L.Ed.2d 446 (1970), those states in which juries do participate in imposing the death penalty use 12-member juries for this task. Moreover, the Supreme Court has recognized that the number of jurors is related somewhat to the reliability of their decision, and therefore no state jury may be reduced below 6 in number without violating due process. *Ballew v. Georgia*, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978). Appellant claims that, if there are at least 12 court-martial members, there will be an input of diverse viewpoints, so that any decision on imposing capital punishment is less likely to be arbitrary or capricious.

The defense concedes that a civilian judge alone may be entrusted with imposing the death sentence, *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); *Walton v. Arizona*, *supra*; and he may even be empowered to override a jury recommendation for life imprisonment. *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). However, appellant points out that a judge has a professional background which qualifies him for his sentencing task, while court-martial members lack similar experience.

Under RCM 1004, the court-martial members—who have been chosen pursuant to the criteria set forth in Article 25 of the Code, 10 USC § 825-must be unanimous in finding aggravating factors.[18] The military judge can, at least, recommend a commutation of a death

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[18] Unanimity is not always required by state law. *See Jackson v. State*, 530 So.2d 269, 271 (Fla. 1988)—the vote to recommend the death penalty was 7-5; *Parker v. State*, 476 So.2d 134 (Fla. 1985)—the vote was 8-4.

sentence adjudged;[19] and the convening authority is empowered to commute the sentence. Furthermore, a Court of Military Review, composed of trained appellate military judges, must thoroughly review the law, the facts, and the appropriateness of the accused's sentence. In view of all these safeguards, we are not convinced that a court-martial must have 12 members in a capital case when this is not required in any other type of trial.

Under RCM 1004, the members must unanimously find at least one of the listed aggravating factors. Unlike the procedure under some state statutes upheld by the Supreme Court, *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990), there is no "aggravating factor" which *compels* the sentencing authority to impose the death sentence.[20] Instead, all the court-martial members must "concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances . . . including the factors under" RCM 1004(c). RCM 1004(b((4)(C).

The defense seems to complain that RCM 1004 does not prescribe any mitigating factors to be found by the members of the court-martial. However, by omitting provision for such findings, the rule avoids the problem posed in *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), and in *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). There the instructions of the trial judge were construed by the Supreme Court to mean that a mitigating factor could not be considered at all unless all the jurors concurred in finding that it existed. Thus, such an instruction might enable a juror who wanted the death penalty imposed to hold out against any findings that mitigating fac-

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[19] We need not decide now whether the military judge is himself empowered to set aside a death sentence that he considers disproportionate or otherwise defective.

[20] If the President had attempted to require that a death sentence be adjudged if an "aggravating fractor" were found, we believe he would clearly have exceeded his constitutional authority.

tors existed. Instead, RCM 1004 allows an accused broad leeway to bring to the attention of the court-martial members any information which he believes would mitigate his sentence. *Cf. Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 A(1989); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Appellant has contended that RCM 1004 is defective because it lacks any provision to prevent racial bias—like that included in a recently enacted federal anti-drug statute. Section 848(*o*) of Title 21, USC, requires that, in a drug case where the death penalty is authorized, the jury be instructed not to "consider the race, color, religious beliefs, national origin, or sex of the defendant or the victim." This statute did not become effective until after appellant's trial (102 Stat. 4545) and, by its own terms, applies only to jury trials in federal district courts. Its requirements—however desirable they may be[21]—are not constitutionally mandated; otherwise, the Supreme Court would have applied them to capital cases tried by state courts.[22]

Appellant contends that court-martial members would be misled by the sentencing procedure, because they must find "any aggravating factors" but they do not make findings as to "mitigating factors." His assumption is that, if one or more "aggravating factors" are found and no "mitigating factors" are specifically found, the members will inevitably conclude that the "aggravating factors" substantially outweigh the "mitigating factors." Under this view, the President's attempt to allow the members the maximum leeway to consider mitigating evidence—in compliance with the principles announced in *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct.

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[21] The military judge could give such instruction *sua sponte* or if requested by the defense. Such an instruction certainly seems desirable.

[22] Curtis, who is black, was tried by a panel which included several blacks. Despite his claim that he had killed Lieutenant Lotz in a rage provoked by the victim's racial prejudice, the members voted unanimously for the death penalty.

2978, 49 L.Ed.2d 944 (1976), and *Lockett v. Ohio, supra*—is deemed to be a vice rather than a virtue. While there might be some advanages in the procedure urged by the defense for finding mitigating factors, there also can be disadvantages—as evidenced by *McKoy v. North Carolina* and *Mills v. Maryland*, both *supra*. We believe that the President made a constitutionally permissible choice.

The defense insists that RCM 1004 should require a separate finding by the members that "any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances." We are convinced, however, that the weighing of aggravating against mitigating factors can be adequately handled by instructions to the members that they must all concur as to this imbalance and does not require a separate finding. *United States v. Evans*, 27 MJ 34, 40 (CMA 1988), *cert. denied*, 488 U.S. 1011, 109 S.Ct. 797, 102 L.Ed.2d 788 (1989). Such instructions were given here.

In sum, as we construe RCM 1004, it not only complies with due process requirements but also probably goes further than most state statutes in providing safeguards for the accused.

V

This case provides an example of matters that must be considered during appellate review before a death sentence can be approved. Here, one of thhe "aggravating factors" found by the court-martial was that Mrs. Lotz had been killed by appellant in the preparation of a burglary. However, two other "aggravating factors" were submitted to the members. Specifically, the members found:

> PRES: Lance Corporal Ronnie A. Curtis, United States Marine Corps, this court-martial finds that the following aggravating factors have been proven beyond a reasonable doubt:
>
> That with regard to the premeditated murder of Mrs. Joan M. Lotz, the premeditated murder of her was com-

mitted while the accused, Lance Corporal Ronnie A. Curtis, U.S. Marine Corps, was engaged in the commission of a burglary;

That with regard to the premeditated murder of Mrs. Joan M. Lotz, that the accused, Lance Corporal Ronnie A. Curtis, has been found guilty in the same case of another murder, to wit: That of Lieutenant James F. Lotz, United States Marine Corps Reserve, in violation of Article 118, Uniform Code of Military Justice, and

That with regard to the premeditated murder of Lieutenant James F. Lotz, U.S. Marine Corps Reserve, the accused, Lance Corporal Ronnie A. Curtis, U.S. Marine Corps, has been found guilty in the same case of another murder, to wit: that of Mrs. Joan M. Lotz, in violation of Article 118, Uniform Code of Military Justice.

Either of these latter two "factors" meet the criteria of RCM 1004(c)(7)(J): "The accused has been found guilty in the *same case* of another violation of Article 118; . . ." (Emphasis added.) There is some authority to the effect that the separate findings as to these two "factors" might represent a double counting of "aggravating factors"; and, hence, one of the findings might need to be vacated. *People v. Harris*, 36 Cal.3d 36, 201 Cal.Rptr. 782, 801, 679 P.2d 433, 452 (1984), *cert. denied*, 469 U.S. 965, 105 S.Ct. 365, 83 L.Ed.2d 301 (1984); *Wilson v. State*, 300 S.E.2d 640, 648, (Ga.), *cert. denied*, 464 U.S. 865, 104 S.Ct. 199, 78 L.Ed.2d 174 (1983); *State v. Goodman*, 257 S.E.2d 569 (NC 1979). We leave open this issue for consideration during further proceedings in this case. However, we observe that setting aside one "aggravating factor" where others remain does not mandate vacating the death sentence. *Clemons v. Mississippi*, *supra*. If it is decided hereafter that only two—rather than three—"aggravating factors" should have been found by the court-martial, then it will be necessary for the Court of Military Review to determine whether the death sentence would have been adjudged at trial if only two "factors" had been found. *Cf. United States v. Sales*, 22 MJ 305 (CMA 1986); *United States v. Suzuki*, 20 MJ 248 (CMA 1985).

Article 66(c) UCMJ, 10 USC § 866(c), provides that, "[i]n a case referred to it, the Court of Military Review . . . may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, *as it finds corect in law and fact* and determines, *on the basis of the entire record*, should be approved." (Emphasis added.) This extensive appellate review, which includes review of appropriateness of sentence, seems unique to military justice. However, many states provide for review of death sentences—usually refered to as a "proportionality review." *See, e.g., Gregg v. Georgia, supra*, 428 U.S. 153, 96 S.Ct. 2909.

This review is not constitutionally required in civilian cases where the statutory procedures adequately direct the sentencing authority's exercise of discretion. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 306, 107 S.Ct.1756, 1774, 95 L.Ed.2d 262, 288 (1987); *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). In view of the safeguards prescribed by RCM 1004, we are convinced that a "proportionality review" is not required by the Eighth Amendment, which prohibits "cruel and unusual punishments," or by Article 55, 10 USC § 855, which prohibits "cruel or unusual punishment." However, we conclude that such a review is encompassed within the responsibility for determining appropriateness of sentence under Article 66 of the Code. Likewise, in the unique context of the death penalty, we believe that Congress intended for our Court to oversee this review in order to assure that it is properly performed.

In *Solem v. Helm*, 463 U.S. 277, 292, 103 S.Ct. 3001, 77 L.Ed.2d 637, 650 (1983), the Supreme Court stated:

> In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

With this guidance in mind, we conclude that proportionality review *need not* be limited to death sentences from the accused's own Service or even to death sentences imposed by courts-martial.[23]

Accordingly, before a death senence adjudged by a court-martial can be approved, the Court of Military Review must determine: (a) whether one or more valid aggravating factors have been unanimously found by the court-martial and this finding is factually and legally correct; (b) if any corrective action results in setting aside any such finding but leaves intact at least one "aggravating factor," whether this error affected imposition of the sentence; (c) whether the death sentence adjudged is proportionate to other death sentences that have been imposed; and (d) whether under all of the facts and circumstances of the case the death sentence is appropriate, Art. 66(c).

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[23] An interesting South Carolina case deals with a proportionality review of a death sentence where there had been no prior death sentences in that jurisdiction that could be used for comparison. *See State v. Shaw*, 273 S.C. 194, 255 S.Ed.2d 799, 807 (1979):

> We have compared the death sentences imposed upon appellants with the sentences imposed in all prior capital cases tried under the current death penalty states and are satisfied that there are no similar cases aginst which the proportionality of the sentences imposed upon appellants can be measured.
>
> The inability of this Court to compare this case with any other similar cases does not require, however, that appellants' sentences be set aside. Any system of review that requires a comparison of each case with all similar prior cases must have a beginning. There will be a first case for each type or category of capital case that may appear and that first case necessarily cannot be compared to any other similar cases. The first case must stand alone, otherwise comparative sentence review would be forever impossible.

(Footnote omitted.)

This was the first capital punishment case reviewed in South Carolina under death penalty statutes revised after *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

VI

We shall set this case for further argument to dispose of the remaining questions which have been raised by the defense. After deciding them, we shall issue our mandate.

SULLIVAN, Chief Judge (concurring):

I concur with the scholarly and excellent opinion of Senior Judge Everett concerning the constitutionality of RCM 1004, Manual for Courts-Martial, United States, 1984. However, I reserve judgment on the effect of Article 66, Uniform Code of Military Justice, 10 USC § 866, on this case since such a holding is not required to answer the specified issues decided today.

It is my personal view, however, that, in peacetime, a servicemember in a capital case should be tried by a 12-member court-martial. The value of a soldier's life is surely equal to the value of the life of his fellow citizens. *Cf. Williams v. Florida*, 399 U.S. 78, 103, 90 S.Ct. 1893, 1907, 26 L.Ed.2d 446 (1970). Nevertheless, neither the Constitution itself, nor Congress in legislation, nor the President by regulation has mandated a 12-member panel in a military capital case. *See generally* Van Loan, *The Jury, The Court-martial, and The Constitution*, 57 Cornell L. Rev. 363, 384 n.118 (1972). Moreover, it is the duty of this Court to apply the law of the land, not to legislate by judicial fiat, and therefore, it is beyond our power to mandate such a procedure. Finally, appellant himself, by use of his challenges, reduced in part the number of court members detailed to this case from 15 to 9. Moreover, he did not particularly object to trial by 9 members at this court-martial or request the detail of additional members. I could not find reversible error in these circumstances even if appellant was somehow entitled to a 12-member panel.

COX, Judge (concurring):

I concur with the resolution of the specified issues before us. I write only to reserve judgment on some other matters discussed by Senior Judge Everett which are used to illustrate the rationale of his decision.